SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 28

LOUIS KATCHEN, PETITIONER,

vs.

HYMAN D. LANDY,
TRUSTEE IN BANKRUPTCY, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 18, 1965

[fol. 2]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

In the Matter of

KATCHEN'S BONUS CORNER, INC., Bankrupt.

Number 27421 in Bankruptcy.

* * * * * * *

[fol. 4]

PETITION FOR REVIEW

* * * * * * *

[fol. 7]

EXHIBIT "A" TO PETITION FOR REVIEW

Memorandum Opinion of the Chief Referee in Bankruptcy on Issues Between Trustee and Louis Katchen Concerning Alleged Preferences and Payment for Corporate Stock, and Between Trustee and Howard Katchen Concerning Payment for Corporate Stock, Repayment of Moneys Expended for Personal Debts, and Alleged Improper Disbursements and Losses; Findings of Fact and Conclusions of Law; And Orders and Judgments.

Solomon Girsh and Robert B. Rottman, for the Trustee.

Fred M. Winner and Raymond C. Johnson, for Louis Katchen and Howard Katchen.

Hilliard, Chief Referee. Louis Katchen timely filed claims (Nos. 56 and 58) respectively for $5000.00, representing a payment made by him as an accommodation maker on a note of the bankrupt, and for $4,625.00 for rent due him from the bankrupt. * * *

After these claims had been filed the Trustee presented a "Petition to Avoid Preferences, for Turnover of Property, for Payment of Stock, and for Order to Show Cause,"

and an amended petition for like relief, both directed to Louis Katchen. • • •

Upon the filing of the petitions Louis Katchen and Howard Katchen promptly interposed objections to the summary jurisdiction of the Referee and they have maintained that position while unwillingly contesting the petitions on their merits. The Referee overruled their objections and has proceeded on the ground jurisdiction in the premises inheres under Inter-State National Bank v. Luther, 10 Cir. 221 F. 2d 382. The relief sought by the Trustee is (1) to avoid preferences asserted to have been received by Louis Katchen and Howard Katchen, (2) to obtain payment for stock of the corporation claimed to be due from Louis Katchen and Howard Katchen, and (3) to obtain repayment or reimbursement of funds received by or losses alleged to have been caused by acts of Howard Katchen. These are matters of set-off and counterclaim [fol. 8] as to the claims filed by the two Katchens, and thus within the doctrine of Inter-State. It is the duty of the Referee, therefore, to make determination upon the issues presented by the claims, set-offs and counterclaims, the evidence adduced, and the law relevant thereto.

The bankrupt, a Colorado corporation, began business April 21, 1960, in a building rented from Louis Katchen. Howard Katchen, a son of Louis, then became and remained president and general manager. James R. Burchinal became secretary. The two named Katchens and Burchinal, and Bruce Katchen, another son of Louis, became the stockholders. Louis, Howard and Burchinal comprised the officers and members of the board of directors. October 30, 1960 Louis resigned from his offices of vice-president and director and was replaced by Judith Katchen, a daughter-in-law.

April 21, 1960, the corporation borrowed $40,000.00 from the American National Bank and gave its note upon which Louis concedes and asserts he was an accommodation maker. June 15, 1960, $10,000.00 was borrowed from the North Denver Bank—by or for the corporation—upon a

note bearing the typed name of the corporation in the upper right corner and on the signature lines the following:

(In typewriting)	Katchen's Bonus Corner
(Signature)	Howard M. Katchen
(Signature)	James R. Burchinal
(Signature)	Louis Katchen

The proceeds of this note were used to discharge a debt in like sum owed to North Denver Bank by Furniture Distributors, Inc., a Burchinal controlled company, the assets of which the bankrupt acquired on its organization. As to this note, Louis now insists he was not an accommodation maker or otherwise personally liable, and that he signed it only in behalf and as an officer of the corporation. His testimony on different occasions is contradictory in this regard, and the contradictions ought to be resolved against their creator. Hence it is found and held that Louis was an accommodation maker on this note.

October 13, 1960, the bankrupt paid $14,599.00 on account of the $40,000.00 note and $10,137.50 on November 18, 1960. Louis admitted the effect of these payments was to diminish his personal liability and that he knew this when he caused the payments to be made. A like result flowed from the payment of $10,162.50 on September 13, 1960, on the note to the North Denver Bank.

[fol. 9] In its first three months of operation the bankrupt sustained operating losses. August 19, 1960, the bankrupt suffered a fire loss of some $36,000.00. After the fire all of the funds and collections of the bankrupt went into a "trust account" in the name of and under the sole control of Louis. Louis testified the account was created and maintained to "protect" the company against creditors who might seek immediate payment of their debts. The payments to the American National Bank and the North Denver Bank, mentioned in the immediately preceding paragraph, were made by Louis out of this "trust account."

The Trustee, in his petition and amended petition directed to Louis, asserts that as an accommodation maker on the notes to the two banks Louis became a creditor of the bankrupt and that the payments made on the notes were preferences inhibited by Section 60a of the Bankruptcy Act.

Louis answers, first, that his signatures on the notes did not make him a creditor and, second, in any event, the Trustee has failed to sustain the evidentiary burden entailed.

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Was the bankrupt insolvent on any or all of the dates of the three payments to the banks?

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[fol. 10]

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• • • It must follow and the Referee finds that the company was insolvent on each of the payment dates.

• • • • • • •

It is the conclusion of the Referee, therefore, that Louis must surrender and pay over the preferences re-
[fol. 11] ceived by him in accordance with the subjoined orders, and that allowance of his claims must be postponed pending his compliance. Section 57g Bankruptcy Act.

The evidence is equally clear that as of June 16, 1960, Louis agreed to pay $10,000.00 for the 1000 authorized shares of the company, that he caused the shares to be issued to himself, his two sons and Burchinal, and that he has not paid for the shares. His sons and Burchinal then pledged their shares to Louis and they were so pledged when this proceeding was begun; and none of the pledgors ever paid anything to the company or to Louis for the shares.

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[fol. 12]

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The foregoing considered, and it is hereby adopted, as findings of fact and conclusions of law, it is, by the Referee, considered, ordered, adjudged and decreed as follows:

1. That the Trustee do have and recover of and from Louis Katchen the sum of $10,162.50, with interest thereon at 6% per annum from September 13, 1960, until paid.

[fol. 13] 2. That the Trustee do have and recover of and from Louis Katchen the sum of $14,599.00, with interest thereon at 6% per annum from October 13, 1960, until paid.

3. That the Trustee do have and recover of and from Louis Katchen the sum of $10,137.50, with interest thereon at 6% per annum from November 18, 1960.

4. That the Trustee do have and recover of and from Louis Katchen the sum of $10,000.00, with interest thereon at 6% per annum from June 16, 1960.

* * * * * * *

9. That when Louis Katchen has complied with the orders and satisfied the judgment above set forth the claims of said Louis Katchen (Nos. 56 and 58) shall be allowed as unsecured in the respective amounts of $5000.00 and $4,625.00, and he may also, within the time limited by Section 57n of the Bankruptcy Act, file any claims which his compliance with said orders and satisfaction of said judgments warrant.

* * * * * * *

11. That nothing in any of the foregoing orders contained shall be construed so as to deprive said Louis Katchen or said Howard Katchen of any right of set-off which they have or either of them has under Section 68 of the Bankruptcy Act.

[fol. 14] Done at Denver, in said District, on the 8th day of February, 1963.

B. C. Hilliard, Jr.
Chief Referee in Bankruptcy

Filed February 8, 1963.

PROOF OF CLAIM BY INDIVIDUAL

State of Colorado, County of Denver ss:

Louis Katchen (Deponent), of No. 2445 South Colorado Boulevard in Denver (City) County of Denver, State of Colorado, being duly sworn, deposes and says:

1. That Katchen's Bonus Corner, Inc., the above-named bankrupt [or debtor], was at and before the filing by [or against] him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted [or liable] to said deponent in the sum of Five Thousand dollars.

2. That the consideration of said debt [or liability] is as follows: payment of indebtedness of Katchen's Bonus Corner, Inc., to American National Bank of Denver, Colorado, by undersigned as accommodation maker on such indebtedness.

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[fol. 15]

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PROOF OF CLAIM IN BANKRUPTCY

State of Colorado, County of Denver ss:

Louis Katchen (Deponent) of No. 2445 South Colorado Blvd., in Denver (City) County of Denver, State of Colorado states and certifies as follows:

If Claimant is an Individual:

1 (a) That he is the claimant herein.

• • • • • • •

2. That the above-named bankrupt (or debtor) was at and before the filing by (or against) him of the petition herein (for adjudication of bankruptcy), and still is, justly and truly indebted (or liable) to said deponent (or copartnership or corporation), in the sum of Four thousand six hundred and twenty five dollars ($4,625.00).

3. That the consideration of said debt (or liability) is as follows: Rent on building at 1401 West 38th Avenue, Denver, Colorado for months of June to November, 1960, inclusive; and part of May, 1960.

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[fol. 17]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

ORDER DENYING PETITIONERS' MOTION FOR A NEW TRIAL, ETC.—July 26, 1963

On July 19, 1963, the above-entitled case came up for hearing before the undersigned Judge of the United States District Court for the District of Colorado, on the matter of

Petitioners' motion under Rule 52 and Rule 59 of the Federal Rules of Civil Procedure for a new trial and for amendment of the findings of the Court. Petitioners appeared by and through one of their attorneys, Fred M. Winner, and the Trustee in Bankruptcy, by Solomon Girsh, one of his attorneys. Upon consideration of the arguments of the respective counsel;

It is Hereby Ordered, Adjudged and Decreed that Petitioners' motion be and it is hereby denied.

Dated at Denver, in said District, this 26th day of July, 1963.

By the Court:

Alfred A. Arraj, Chief Judge, United States District Court, District of Colorado.

Approved:

[fol. 18]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)—Filed August 19, 1963

Notice is hereby given that Louis Katchen hereby appeals to the United States Court of Appeals for the Tenth Circuit from the order dated July 5, 1963 of the District Court adopting findings of fact and conclusions of law of referee and approving and affirming order of referee of February 8, 1963, and the order denying the motion for new trial dated July 26, 1963.

Fred M. Winner, Attorney for Appellant.

[fol. 19]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May Term—1964

No. 7483

LOUIS KATCHEN and HOWARD M. KATCHEN, Appellants,

vs.

HYMAN D. LANDY, Trustee in Bankruptcy, Appellee.

In the Matter of

KATCHEN'S BONUS CORNER, INC., Bankrupt.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Warren Martin, of Winner, Berge & Martin, for Appellants.

Solomon Girsh, of Girsh & Rottman (Robert B. Rottman with him on Brief), for Appellee.

Before Murrah, Chief Judge, and Phillips, Pickett, Lewis, Breitenstein, Hill and Seth, Circuit Judges.

OPINION—Filed September 9, 1964

MURRAH, Chief Judge.

This appeal involves the bankruptcy court's summary jurisdiction of four counterclaims, three of which seek to [fol. 20] recover voidable preferences, and one to recover from the claimant the purchase price of subscribed organizational stock of the bankrupt corporation. This latter claim does not appear to arise out of the same transaction on which the claim is based. The trial Court upheld the bankruptcy court's assumed summary jurisdiction of all the counterclaims on authority of Inter-State National Bank of Kansas City v. Luther, Trustee, 221 F.2d 382, cert.

granted 350 U.S. 810, cert. dismissed by stipulation of parties, Id., 944.

In Inter-State, we upheld the power of the bankruptcy court to entertain a counterclaim to fully adjudicate and recover a §57(g) preference, whether such counterclaim is compulsory under Rule 13(a) or permissive under Rule 13 (b), F.R.C.P. A majority of the court en banc took the view that the filing of a claim in bankruptcy operates to invoke the bankruptcy court's exclusive jurisdiction under §2(a) (2), to sift the circumstances surrounding any claim and allow or disallow it, according to equitable precepts. And, more specifically, the filing of the claim in bankruptcy operates to invoke the court's concurrent jurisdiction with the state courts under §60(b), to fully adjudicate and recover any voidable preference. See: Inter-State, supra, p. 389. We were furthermore of the opinion that the right to [fol. 21] plenary suit being procedural, may be waived, i.e., see: O'Dell v. United States (10 CA), 326 F.2d 451, and having voluntarily invoked the summary jurisdiction of the bankruptcy court, the claimant could not thereafter limit the exercise of that jurisdiction over the subject matter by objection thereto. See: Inter-State, supra, p. 388; and Continental Casualty Co. v. White, 269 F.2d 213, 216. Cf.: United Artists Corporation v. Masterpiece Productions, 221 F.2d 213.

Appellants concede that the three preferential counterclaims are ruled by Inter-State, supra, and candidly say that insofar as that case sustains summary jurisdiction to grant affirmative relief on a counterclaim over the objection of the claimant, it is an unwarranted extension of jurisdiction by implied consent and should now be overruled. We heard this case en banc, to re-examine Inter-State in the light of the claims made for it here and because it presents an important question of bankruptcy administration, as to which there is a difference of opinion on this court and elsewhere.

Since Inter-State, other Circuits have considered the question of summary jurisdiction of counterclaims based upon consent implied by the filing of claims. Soon after Inter-State, the Seventh Circuit concurred in the view that

[fol. 22] the filing of a claim in the bankruptcy court gave consent to be sued on counterclaims arising out of the same transaction, but was of the view that such filing did not constitute implied consent to be sued "on an alleged cause of action arising out of a different subject matter." In Re Majestic Radio & Television Corporation, 227 F.2d 152, 156. The Fourth Circuit has also concurred in the view that the filing of a claim gave consent to the exercise of summary jurisdiction over a compulsory counterclaim, but had no occasion to decide whether the filing of a claim gave the court jurisdiction of an unrelated and permissive counterclaim. See: Continental Casualty Co. v. White, supra. The Ninth Circuit has upheld the jurisdiction of the bankruptcy court over a counterclaim, but agreed with the Seventh Circuit that the filing of a claim did not give consent to summary jurisdiction of a counterclaim not arising from the same transaction on which the claim was based. See: Peters v. Lines, 275 F.2d 919.

The most recent case involving the precise point is from the Second Circuit where, apparently on authority of Inter-State, supra, it sustained summary jurisdiction of a counterclaim for the surrender of a preference without stating whether the counterclaim arose out of the same transaction. Judge Kaufman, speaking for that Court, reasoned [fol. 23] that the filing of a claim in the bankruptcy court is analogous to the commencement of an action within the bankruptcy proceedings; that the Trustee's counterclaim was in the nature of an answer for affirmative relief by way of the surrender of a preference; and, that the claimant is deemed to have impliedly consented to the jurisdiction of the court toward complete relief. See: Nortex Trading Corporation v. Newfield, 311 F.2d 163. And see also: In the Matter of Farrell Publishing Corporation, Bankrupt, 130 F. Supp. 449; and Collier On Bankruptcy, Vol. 2, §§23.08[5], 23.08[6].[1]

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[1] Professor James William Moore, Editor-In-Chief of the 14th Edition of Collier On Bankruptcy, treated Inter-State in a comprehensive article entitled RES JUDICATA AND COLLATERAL ESTOPPEL

Upon reconsideration of Inter-State, in the light of subsequent decisions and commentary, we have decided to adhere to its pronouncements. But, we decline to extend the [fol. 24]summary jurisdiction of the court by implied consent to counterclaims which do not involve a preference, set-off, voidable lien, or a fraudulent transfer, and which are wholly unrelated to the creditor's claim. Claims of this nature are not within the Referee's summary jurisdiction, and a claimant does not consent to the exercise of the bankruptcy court's plenary jurisdiction by filing his claim in the bankruptcy proceedings. See: Collier On Bankruptcy, Vol. 2, §23.15.

The appellants also deny that the counterclaims are based upon a preference, on the ground that the Trustee failed to sustain the burden of proving that the bankrupt was insolvent when the transfers giving rise to the preference claim were made. But, there can be no doubt that appellants knew, or had reason to believe, that the corporation of which they were the progenitors and central figures was insolvent when they caused it to make payments to the bank, on notes on which appellant-Louis Katchen was an accommodation maker. The proof here fully meets the test set forth in Moran Brothers v. Yinger, 323 F.2d 699.

The judgment of the bankruptcy court is affirmed on all the counterclaims except the Trustee's counterclaim for the purchase price of the subscription stock.

IN BANKRUPTCY, 68 Yale L.J. 1, 32. Professor Moore agrees with the majority of the court in Inter-State on two grounds: (1) Under the doctrine of Alexander v. Hillman, 296 U.S. 222, "equity once invoked will achieve complete relief." See also: Taylor v. Producers Pipe & Supply Co., 114 F.2d 785. (2) On the theory that a "sound construction of the Bankruptcy Act warrants complete adjudication." Id., p. 38. He also reasoned with the majority in Inter-State that "as an incident of its power to disallow claims, the bankruptcy court * * * has jurisdiction to determine a §57(g) issue raised by the Trustee, and by the same reasoning, to entertain a counterclaim recognized by §68, authorized by Rule 13, and based upon the §57(g) issue. * * *"

And see: Case Notes, 60 Mich. L. Rev. 96; 69 Harvard L. Rev. 377.

[fol. 25] SETH, Circuit Judge, concurring:

I concur in the foregoing opinion of the court as expressed by Chief Judge Murrah, and would like to state some considerations which I consider important in examining the action of the trial court and the referee.

The record shows that the bankrupt corporation began business in April 1960 with the appellant as a vice president, director, and stockholder. His two sons and a third party were the other stockholders and directors. The referee found that the appellant agreed to pay $10,000.00 for the one thousand authorized shares of the company, that he caused the shares to be issued to himself, his two sons, and a third party. The two sons and the third party then pledged their shares to the appellant and such pledge was in effect when the bankruptcy proceedings commenced. He further found that none of the pledgors ever paid anything to the company or the appellant for the pledged shares. It appears that the shares that the two sons were to receive were to be in the form of a gift from the appellant. Appellant was a vice president and director until his resignation on October 30, 1960.

In April 1960 the bankrupt borrowed $40,000.00 from the [fol. 26] American National Bank and gave a note upon which appellant asserts that he was an accommodation maker. In June 1960 the bankrupt borrowed $10,000.00 on a note from the North Denver Bank. This note bore the typewritten name of the bankrupt and the signature of the appellant and two other stockholders without further designation or description. Appellant claims he is not an accommodation maker or personally liable on this $10,000.00 note.

The bankrupt suffered in August 1960 a fire loss, and thereafter the collections of the bankrupt were placed in a so-called trust account in the name of and under the sole control of the appellant. The appellant paid on October 13, 1960, from corporate funds in this trust account the sum of $14,599.00 and on November 18, 1960, the sum of $10,137.50 on the $40,000.00 note given to the American National Bank

above referred to. Appellant admitted these payments served to diminish his personal liability, and that he knew this when he made the payments. The appellant from this trust fund further paid in September 1960 the sum of $10,-162.50 to the North Denver Bank on the note described above.

The appellant filed in the bankruptcy proceedings two [fol. 27] claims, one in the amount of $4,625.00 for unpaid rent on the premises which he owned and which were occupied by the bankrupt, and the second claim in the amount of $5,000.00 representing a payment to the bank from claimant's personal funds as an accommodation maker on the note of the corporate bankrupt given to the American National Bank described above.

The referee found that the payment of the corporate funds from the trust account on the bank notes constituted a preference received by the appellant, and repayment of the total of such payments was ordered. The referee further ordered the appellant to pay the amount of $10,000.00 as an unpaid subscription for the corporate stock.

Against this background of business dealings, family relationships, and participation in the management of the bankrupt, the appellant filed his claims. The appellant made this filing not only with his complete and intimate knowledge of the corporate transactions which were involved, but also with what we must assume to be his knowledge of the law pertaining to the filing of such a claim.

Appellant, we must also assume, had knowledge that his [fol. 28] claim would be heard before the bankruptcy court, and the scope of the hearing would include those subjects required by 11 U.S.C.A. §§96 and 93(g). This scope and issues of the summary hearing necessarily included, and the referee was required by law, to determine whether or not the disbursements of corporate funds made by the appellant to the banks in partial payment of the notes on which his signature appeared constituted a preference. This is clearly a part of the substantive law of bankruptcy. The hearing necessarily had to include sufficient testimony and evidence in order that the referee could decide whether

or not there had been a preferenc to appellant. Such a determination in any case of this character would be binding by res judicata or by equitable estoppel in any subsequent plenary action. The plenary suit would thus be reduced to a mere formality except as to the dollar amount of the preference, and perhaps not even that. Schwartz v. Levine & Malin, 111 F.2d 81 (2d Cir.), held such amount was just as important for the bankruptcy court to determine as the nature of the payment because the allowance of the claim was conditional on repayment of the preference. [fol. 29] Thus under the circumstances it is certainly reasonable to believe that the appellant expected when he filed his claim that at least other payments on the same note also remitted by himself would be considered, and that the whole matter was so interrelated that obviously the issue of preference would be litigated. This waiver is even clearer when made in a jurisdiction where Inter-State Nat'l Bank of Kansas City v. Luther, 221 F.2d 382 (10th Cir.), is the prevailing rule. There the question is exhaustively treated, and a claimant's position is clearly stated. This scope of the hearing is not a procedural matter but again is a matter of substantive bankruptcy law. The court cannot close its eyes to what the appellant did in the preference transaction and when considering what he did as a claimant. Both are matters of substantive bankruptcy law and both are matters for determination by the same court to accomplish a complete disposition of the issues before the equity court. The appellant by his claim submitted the entire question to the bankruptcy court, not just a portion of it. This is the reason why the substantive law relating to setoffs, fraudulent transfers, and similar transactions are handled in the man- [fol. 30] ner they are. The claimant has a right to have his claims and relationships with the bankrupt determined. This right carries with it the expectation of a complete adjudication of his claims and preferences like any other litigation he may be involved in outside the bankruptcy field. This again really differs from setoffs, balancing of accounts, and fraudulent transfers only in the relative amounts involved. Any litigant or claimant when he enters

any court room can expect to be met by counterclaims and by setoffs. The only choice such litigant has is whether or not he should become the moving party or wait and become a defendant. This can be a difficult decision but one faced by litigants frequently. The decision here is whether to become a moving party and also to submit the adjudication of claims and preferences to the bankruptcy court without a jury, or whether to forego the filing of his claim and wait to become a defendant. The bankruptcy proceeding, like the right to trial by jury, has its origin in the Constitution and they are to that extent of equal dignity. There is no question that Congress under §8 of Article 2 of the Constitution has the power to establish laws relative to the handling of claims and preferences. Since bankruptcy pro-
[fol. 31] ceedings are of equitable nature, these claims, setoffs, voidable liens, and fraudulent transfers are handled by summary proceedings. This substantive law is such that when a claimant submits the disposition of his claim, he thereby submits to the adjudication by such court of all issues relating to his claim, and to any asserted preferences he may have received. His claim has to pass this statutory preference test.

As indicated above the determination of the issue of a preference is binding by res judicata on the parties in the event that plenary proceedings be commenced. Thus it would serve no useful purpose to try the same issue in such proceedings. This finality of decision in summary proceedings is an important factor in evaluating the issue before us at this time. The author of 3 Collier, Bankruptcy, 14th Ed., at ¶57.14, in discussion of allowance or disallowance of claims, states: "Where disallowance (pending surrender of preferences) is based on a voidable preference, the findings with regard to the preference are *res judicata* in the trustee's suit to recover the preference." The author further states on the issue of the power of the court: "But a litigated issue of jurisdiction, like other issues, may be con-
[fol. 32] clusively adjudicated, and the fact that the court may exceed its jurisdiction, *e.g.*, the referee rendering an affirmative judgment on the trustee's counterclaim without

the creditor's consent, does not preclude the judgment from having the effect of *res judicata*: the judgment may be erroneous and subject to reversal on appeal, but it is not void and subject to collateral attack." The Supreme Court in Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104, and in Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244, has held that the determination by the court of bankruptcy of its jurisdiction is res judicata in subsequent proceedings. The Second Circuit in Schwartz v. Levine & Malin, 111 F.2d 81, stated that the determination or finding as to the preferential nature of a payment to the claimant made following the summary hearing on the claim is res judicata in a subsequent plenary action. In the cited case the court had before it such a plenary action and held that the trial court was correct in granting a summary judgment on the ground that the matter of the preferential nature of the payment had been determined in the bankruptcy court. The court there added, [fol. 33] as above indicated in this opinion, that the amount of the payment was as important as the nature of the payment. Thus apparently the court would and did apply the doctrine or res judicata both as to the amount and character of the payment. The court concluded its opinion by stating: "All the conditions were fulfilled which made his findings res judicata, and there was nothing left to be decided in the action at bar," citing Fayerweather v. Ritch, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193. A similar holding appears in Giffin v. Vought, 175 F.2d 186 (2d Cir.), and in Johnson v. Wilson, 118 F.2d 557 (9th Cir.). A clear indication that the determination of the issue of preference during the hearing on the claim is not a matter of consent by the claimant, as indicated in In Re J. R. Palmenberg Sons, Inc., 76 F.2d 935, aff'd. sub nom. Bronx Brass Co. v. Irving Trust Co., 297 U.S. 230, 56 S.Ct. 451, 80 L.Ed. 657, where the court refused to let the claimant withdraw his claim when the bankruptcy court was in the process of considering the preference issue. Res judicata was further carefully considered by the state court in Feiring v. Gano, 114 Colo. 567, 168 P.2d 901. The bankruptcy court judgments

have the same effect as those of other courts having general [fol. 34] jurisdiction. The general principles relating to res judicata and equitable estoppel are applied. The issues which were or could have been adjudicated become significant. Professor Moore in his article on this subject in 68 Yale L.J. 33 states: "When, however, the trustee does interpose a section 57g defense and the issue is decided against him, allowance of the claim bars his subsequent action to recover on the theory of a voidable transfer. For similar reasons, a decision in the trustee's favor on a section 57g defense concludes the issue against the creditor in a later plenary action brought by the trustee to recover the money or property preferentially or fraudulently transferred."

The trustee seems to have little choice as to summary or plenary actions. The author of 2 Collier, Bankruptcy, states in a footnote to ¶23.08: "It is immaterial that the bankruptcy trustee does not consent to the jurisdiction of the bankruptcy court with respect to a suit against him by an adverse claimant, since he is merely the court's officer and if the adverse parties consent that the matter be adjudicated by the bankruptcy court and the court so orders, the trustee's consent follows such order. Section 23 has no [fol. 35] application. (Citing several cases)."

The appellant has waived by the filing of his claims in this action any right to object to the nature or the scope of the summary hearing insofar as it may cover claims and preferences. Such subjects are clearly within the substantive bankruptcy law, and he must abide by the decision of the court.

I concur in the opinion of the court as announced by Chief Judge Murrah on this point and also in its holding that there was no such waiver by the appellant as to the stock subscription, it being wholly outside the matter of claims and preferences.

[fol. 36] PHILLIPS, Circuit Judge, whom Circuit Judges Lewis and Breitenstein join, concurring in part and dissenting in part:

Where used herein the word "creditor" refers to a general creditor, who asserts a provable claim against a bankrupt's estate.

I start with the premise that a jury trial cannot be had in a proceeding before a referee in bankruptcy.

It is my opinion that the trustee cannot assert in a counterclaim to a claim filed by a creditor, a claim against the creditor, which, absent the filing of the claim by the creditor, the trustee could only have asserted in a plenary action in which the creditor would be entitled to a trial by jury, unless the creditor had consented to the summary determination of the trustee's claim by the referee; and further, that the filing of a claim by the creditor does not constitute such a consent.

It will be observed that what I say is restricted to a trustee's claim of a character, which, if asserted in an ordinary [fol. 37] plenary action, the defendant thereto would be entitled to a jury trial. It is so restricted, because the claim asserted by the trustee in each of the several counterclaims here involved is of that character.

The reason for my conclusion may be simply stated. The right of a general creditor of the bankrupt to file a claim against the bankrupt estate, to have his claim determined, and, if allowed, to participate in the distribution of the bankrupt estate is a substantive and fundamental right. The privilege to exercise such a fundamental right may not be conditioned by a mere procedural rule on the surrender of another distinct and nonalternative fundamental right of the creditor. The other right here involved is a constitutional right of the creditor to have a claim asserted against him by the trustee, absent his consent to the summary disposition thereof by the referee, determined on a trial by [fol. 38] jury in a plenary action. The creditor may not be compelled to choose between the exercise of two distinct and nonalternative fundamental rights by Rule 13 of the Federal Rules of Civil Procedure.

Moreover, I think what I have said is equally applicable where the trustee's counterclaim is for the recovery of an alleged unlawful preference.

If it is established that the creditor has received or acquired an unlawful preference, his claim against the bankrupt estate must be disallowed in toto, unless he surrenders such preference to the trustee (11 USCA §93(g)). The non-surrendered preference is a bar to the allowance of the claim. It may not be used as a setoff, either to reduce or extinguish the creditor's claim, but only to bar its allowance in toto; and the creditor may not effect the surrender of the preference in whole or in part by crediting on his claim the amount or value of the preference. To permit the unlawful preference so to be used as a setoff or credit [fol. 39] would, in effect, give the creditor the benefit of the unlawful preference and result in his receiving more than his pro rata share in the assets of the bankrupt estate, to the detriment of the other creditors.[1] He must surrender his preference in its entirety, or forego the allowance of his claim. An exception has been recognized in certain cases, but only to the extent of crediting the dividend on his claim. It has been held where a creditor has been adjudged to surrender a preferential payment by a judgment of the bankruptcy court, which may be done when the creditor consents to a summary determination, and it is practical to ascertain the amount of the dividend to which the creditor will be entitled on his claim, the bankruptcy court may permit the creditor, if he is so advised, to prove [fol. 40] his claim against the estate of the bankrupt, determine the amount of the dividend coming to the creditor, and by its final decree direct him to pay over the full amount of the preferential payment with interest, less the amount of his dividend.[2] But in no case could the creditor have

[1] Irving Trust Co. v. Frimitt, D.C.N.Y., 1 F. Supp. 16, 17; Remington on Bankruptcy, Rev. Ed., 1957, Vol. 3, §§ 1455-1456; Rotan Grocery Co. v. West, 5 Cir., 246 F. 685; Walker v. Wilkinson, 5 Cir., 296 F. 850, 852.

[2] Page v. Rogers, 211 U.S. 575, 581. In the opinion the court said:

"* * * In view of the fact that this suit was brought in the bankruptcy court itself, and a final decree is to be en-

credited against the amount to be surrendered as an unlawful preference more than the pro rata dividend he would be entitled to on his claim.

[fol. 41] For the same reasons the claim of the creditor and the counterclaims of the trustee here may not be treated as mutual debts and credits and one set off against the other under 11 USCA § 108.

My conclusion is that the claims here asserted by the trustee for preferences have none of the characteristics of a setoff.

Moreover, it is my opinion that the trustee may not set up as a defense to a claim of a creditor an alleged, but not judicially established claim that the creditor had received or acquired an unlawful preference, which he had not surrendered, and have the alleged claim of an unlawful preference adjudicated by the referee in a summary proceeding; and then set up in an action to recover the unlawful preference the adjudication with respect thereto in the summary proceeding as res judicata. I do not think the trustee should be permitted to have his claim of an unlawful preference established in a summary proceeding, equitable in nature, and by the simple device of not praying for the [fol. 42] recovery of the alleged preference, forever deprive the creditor of his right to have the trustee's claim determined on a jury trial in a plenary proceeding. Otherwise, the trustee could do indirectly that which he could not do directly and thereby deprive the creditor of a jury trial on the claim of an unlawful preference.

Of course, what I have said is restricted to cases where the creditor's claim of right to retain what the trustee as-

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tered by the judge of that court, it is entirely practicable to avoid the circuitous proceeding of compelling the defendant to pay into the bankruptcy court the full amount of the preference which he has received, and then to resort to the same court to obtain part of it back by way of dividend. The defendant may be permitted, if he shall be so advised, to prove his claim against the estate of the bankrupt, and the bankrupt court then may settle the amount of the dividend coming to him, and the final decree may direct him to pay over the full amount of his preference, with interest, less the amount of his dividend. * * *"

serts he received or acquired as an unlawful preference is substantial and not merely colorable.[3]

A court of bankruptcy is in a strict sense a court of equity, except so far as is otherwise expressly provided in [fol. 43] the Bankruptcy Act,[4] and its proceedings are governed by rules of practice in equity.[5]

The right to a jury trial in a matter involving both legal and equitable claims may not be taken away by the prior determination of the equitable claim. In Dairy Queen v. Wood, 369 U.S. 469, the court said:

> "The Federal Rules did not, however, purport to change the basic holding of Scott v. Neely that the right to trial by jury of legal claims must be preserved. Quite the contrary, Rule 38(a) expressly reaffirms that constitutional principle, declaring: 'The right of trial by jury as declared by the Seventh Amendment to the [fol. 44] Constitution or as given by a statute of the United States shall be preserved to the parties inviolate. Nonetheless, after the adoption of the Federal Rules, attempts were made indirectly to undercut that right by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally

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[3] Here, the trustee did not assert and the referee did not find that the creditor's claim of right to retain what the trustee asserted was an unlawful preference was merely colorable and not substantial.

[4] Young v. Higbee Co., 324 U.S. 204, 214; Securities Comm'n v. U. S. Realty Co., 310 U.S. 434, 435; Continental Motors Corporation v. Morris, 10 Cir., 169 F.2d 315, 317; Rader v. Boyd, 10 Cir., 252 F.2d 585, 586.

[5] Pepper v. Litton, 308 U.S. 295, 304; Luther v. United States, 10 Cir., 225 F.2d 495, 498.

came before us in *Beacon Theatres, Inc.*, v. *Westover*, a case which, like this one, arose from the denial of a petition for mandamus to compel a district judge to vacate his order striking a demand for trial by jury.

"Our decision reversing that case not only emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury but also limits the issues open for determination here by defining the protection to which that right is entitled in cases involving both legal and equitable claims. The holding in *Beacon Theatres* was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' * * * "

[fol. 45] See, also, Meeker v. Ambassador Oil Corp., 375 U.S. 160.

This does not leave the trustee without an adequate remedy. He may apply to the referee for an order staying the proceedings on the claim, in order that he may commence and prosecute a plenary action to recover the alleged unlawful preference and if he establishes such preference and obtains a judgment for its recovery and the creditor does not surrender it to the trustee, the trustee may then set up the unsurrendered unlawful preference as a bar to the creditor's claim. That procedure has been approved by respectable authority.[6]

Instances of the converse of the situation here presented will arise, and in my opinion should be considered. The [fol. 46] trustee who asserts a claim for an unlawful pref-

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[6] B. F. Avery & Sons Co. v. Davis, 5 Cir., 192 F.2d 255; Triangle Electric Co. v. Foutch, 8 Cir., 40 F.2d 353, 357; In re Continental Producing Co., D. C. Cal., 261 F. 627, 629; In re G. L. Odell Const. Co., D. C. Colo., 119 F. Supp. 578, 581.

erence may believe it would be to his advantage to have such claim determined by a jury trial in a plenary action. Assume that situation exists, that the person against whom the trustee's claim is asserted has filed a claim as a creditor against the bankrupt estate and that the two claims are so related that if Rule 13(a) of the Federal Rules of Civil Procedure is applicable, the trustee's claim is a compulsory counterclaim. May the creditor by filing his claim, through the operation of a procedural rule, deprive the trustee of his substantive right to a jury trial? I think the answer is obviously no.

What I have said in this opinion supplements my dissent in Inter-State National Bank of Kansas City v. Luther, 10 Cir., 221 F.2d 393, to which dissent I fully adhere.

Accordingly, I concur in the reversal of the referee's order, with respect to the counterclaim for the alleged unpaid [fol. 47] stock subscription, and in all other respects dissent.

[File Endorsement Omitted]

[fol. 48]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips, Honorable John C. Pickett, Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

JUDGMENT—September 9th, 1964

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the brankruptcy court is affirmed on all the counterclaims except the Trustee's counterclaim for the purchase price of the subscription stock.

[On October 15, 1964, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of Colorado.]

[fol. 49] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 50]

SUPREME COURT OF THE UNITED STATES

No. 742, October Term, 1964

LOUIS KATCHEN, Petitioner,

v.

HYMAN D. LANDY, Trustee in Bankruptcy, etc.

ORDER ALLOWING CERTIORARI—April 26, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED
DEC 7 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted]28

LOUIS KATCHEN,
Petitioner,

vs.

HYMAN D. LANDY, Trustee in Bankruptcy,
Respondent.

In the Matter of
KATCHEN'S BONUS CORNER, INC., Bankrupt

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

LOUIS KATCHEN,
Petitioner,

vs.

HYMAN D. LANDY, Trustee in Bankruptcy,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on September 9, 1964.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the referee in bankruptcy (R. 6) is unreported. The order of the District Court (R. 16) is unreported. The opinion of the Court of Appeals, printed in Appendix B is reported in 336 F.2d 535.

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Is Amendment VII of the United States Constitution, which guarantees trial by jury, violated where a referee in bankruptcy exercises summary jurisdiction over a counterclaim by the trustee against a claimant, over objection of the claimant?

2. Does any Act of Congress grant to the referee the power to exercise summary jurisdiction over a counterclaim by the trustee against a claimant, whether the counterclaim is permissive or compulsory?

CONSTITUTION AND STATUTES INVOLVED

The constitutional provision in question is Article VII of the Amendments to the United States Constitution:

"Jury trial in civil actions.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The statutory provisions involved are Sections 60(b) and 2(a)(7) of the Bankruptcy Act, 11 U.S.C. Sections 96(b) and 11(a) (7). They are printed in Appendix A.

STATEMENT

This is a voluntary bankruptcy proceeding involving Katchen's Bonus Corner, Inc. (R. 9). The jurisdiction of the District Court was invoked because the case arises under the Bankruptcy Act.

Petitioner, Louis Katchen, filed two claims in the

bankruptcy proceeding. The trustee then filed counterclaims against petitioner. Petitioner promptly objected to the summary jurisdiction of the referee (R. 7). The objection was overruled by the referee who held that petitioner, by filing the claims, consented to his summary jurisdiction (R. 7). Judgment on the counterclaims was entered by the referee (R. 12, 13). Whether the referee had the right to exercise summary jurisdiction is the question presented.

In April, 1960, the bankrupt corporation borrowed $40,000 from the American National Bank and gave its note upon which petitioner was an accommodation maker. In June, 1960, the bankrupt borrowed $10,000 from the North Denver Bank, giving a note upon which petitioner was again an accommodation maker (R. 8).

In October and November, 1960, the bankrupt corporation made payments of $24,736.50 on the $40,000 note at the American National Bank. In September, 1960, the bankrupt made a payment of $10,162.50 on the note at the North Denver Bank. These payments were made within four months of the filing of the petition in bankruptcy (R. 8).

As stated, petitioner filed two claims in the bankruptcy proceeding. The first was for $5,000.00 representing a payment made by him an as accommodation maker on the $40,000 note at the American National Bank. The second claim was for $4,625.00 for rent due to him from the bankrupt (R. 7, 14, 15).

After these claims were filed, the trustee filed counterclaims against petitioner (R. 7). The trustee asserted that petitioner had received preferential transfers when the bankrupt made the $24,736.50 payments on the American National Bank note and the $10,162.50 payment on the North Denver Bank note. The trustee further claimed that petitioner owed $10,000.00 because he had promised to pay

the bankrupt that amount for capital stock (R. 7). The referee entered judgment on these counterclaims (R. 12, 13). The District Court adopted all the finding and conclusions of the referee and affirmed the judgment (R. 16).

The Tenth Circuit, en banc, unanimously reversed the $10,000.00 judgment based on the promise to pay for capital stock holding that the filing of a claim does not give the referee summary jurisdiction over counterclaims which do not involve a preference, set-off, voidable lien, or a fraudulent transfer, and which are wholly unrelated to the creditor's claim. However, by a 4-3 decision, the Court "upheld the power of the bankruptcy court to entertain a counterclaim to fully adjudicate and recover a Section 57(g) preference, whether such counterclaim is compulsory under Rule 13(a) or permissive under Rule 13(b), F.R.C.P." (Appendix B). The judgments on the preferences were upheld. The counterclaim on the $10,162.50 payment to the North Denver Bank is clearly permissive as the claims filed did not in any way involve that bank or that note. The counterclaim on the payment to the American National Bank is not clearly either permissive or compulsory. The majority relied upon the Tenth Circuit case of *Inter-State National Bank v. Luther*, 221 F.2d 382.

Judge Phillips, writing the dissent, stated that petitioner had a right to a plenary trial to determine the counterclaims and was therefore, in the summary proceeding, denied his constitutional right to a jury trial. Further, Judge Phillips referred to his dissent in the *Luther* case, supra, where he noted that no section of the Bankruptcy Act grants summary jurisdiction under these circumstances.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is directly in conflict with the decisions of the Fifth Circuit in *Gill v. Phillips*, No. 20780, decided October 15, 1964, and in

Avery v. Gill, 192 F. 2d 255. This conflict was noted by the Fifth Circuit in the *Gill* case:

> "Much controversy has centered around the question to what extent the filing of a proof of claim constitutes consent to the summary jurisdiction of the bankruptcy court. Most of the circuits have now adopted the proposition that filing a proof of claim is consent to the summary adjudication of all controversies arising out of the same transaction which is the basis of the creditor's claim. Only one court has extended this rule to include a counterclaim by the trustee which arose out of a separate and distinct transaction. * * *" (The Court was referring to Inter-State National Bank v. Luther, 10 Cir., 221 F. 2d 392, which the 10th Circuit in the instant case followed.)

As with the instant case, both Fifth Circuit cases involved counterclaims against claimants based on preferences. The Fifth Circuit reached the opposite decision, that the filing of a claim did not constitute implied consent to summary jurisdiction, at least on a permissive counterclaim.

The Tenth is the only Circuit permitting summary jurisdiction of such a counterclaim. Other circuits have permitted summary jursdiction of some compulsory counterclaims, but in so holding have carefully noted that they were not permissive. Thus there is in effect a conflict with these circuits also. *Continental Casualty Company v. White*, 4 Cir., 269 F. 2d 213; In re *Solar Manufacturing Corporation*, 3 Cir., 200 F. 2d 327; *Peters v. Lines*, 9 Cir., 275 F. 2d 919.

The Seventh Circuit in *Majestic Radio v. Dwyer*, 227 F. 2d. 152, held that summary jurisdiction did not exist over a permissive counterclaim against a claimant.

The conflicts between the Circuits have long existed and should be resolved by this Court.

2. The Constitutional right to a jury trial as declared by the Seventh Amendment is involved and was

denied petitioner in this case. There can be no jury trial in a summary proceeding before a referee. The Tenth Circuit has held that a creditor filing a claim loses his right to a plenary trial and a jury trial on any preference counterclaim filed by the trustee. (There is no dispute that in the absence of the filing of a claim a plenary trial must be held to determine alleged preferences in a court of competent jurisdiction.) Under this holding, a creditor is faced with the choice of foregoing his right to file a claim or losing his right to a plenary trial in actions brought against him by the trustee. As Judge Phillips said in the dissent, Appendix D:

> "The privilege to exercise such a fundamental right may not be conditioned by a mere procedural rule on the surrender of another distinct and nonalternative fundamental right of the creditor."

3. Clearly, the question presented is of importance in the administration of the federal bankruptcy laws. The issue arises dozens of times each year. This Court granted certiorari in *Inter-State National Bank v. Luther*, 10 Cir., 221 F. 2d 382, cert. granted 350 U. S. 810. The same questions were presented in that case and in the instant case, and the majority here relied on its holding there. Certiorari was dismissed by stipulation of the parties in the *Luther* case, 350 U.S. 944.

4. The decision of the court below is plainly erroneous. Aside from the Constitutional considerations, the referee has only that summary jurisdiction granted him by statute. There is no statute providing that the filing of a claim invokes the summary jurisdiction of the referee on any counterclaim based on a preference against the claimant, whether or not the counterclaim arose out of the same transaction as the claim. The majority does not appear to rely on any specific section of the Bankruptcy Act. In the instant case, Section 60b, 11 U.S.C. 96(b) (Appendix A) is referred to. But that section, on recovery of preferences,

recognizes a plenary action may be necessary, and merely gives state courts and federal courts concurrent jurisdiction to determine the issue in *plenary* actions.

Section 2 (a) (7) of the Bankruptcy Act, 11 U.S.C. 11 (a) (7) (Appendix A), provides for summary jurisdiction by implied consent where "an adverse party does not interpose objections to the summary jurisdiction of the court of bankruptcy * * *." But here, objection was promptly made (R. 7).

There being no statute conferring summary jurisdiction on the referee under these circumstances, the decision of the Tenth Circuit was wrong.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATUTES

Section 2(a)(7) of the Bankruptcy Act, 11 U.S.C. 11(a)(7):

"Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction."

Section 60(b) of the Bankruptcy Act, 11 U.S.C. 96(b):

"Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: Provided, however, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property,

but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MAY TERM - 1964

LOUIS KATCHEN and
HOWARD M. KATCHEN,
Appellants,

vs.

HYMAN D. LANDY,
Trustee in Bankruptcy,
Appellee.

In the Matter of
KATCHEN'S BONUS CORNER, INC.,
Bankrupt.

NO. 7483

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Warren Martin, of Winner, Berge & Martin, for Appellants.

Solomon Girsh, of Girsh & Rottman (Robert B. Rottman with him on Brief), for Appellee.

Before MURRAH, Chief Judge, and PHILLIPS, PICKETT, LEWIS, BREITENSTEIN, HILL and SETH, Circuit Judges.

MURRAH, Chief Judge.

This appeal involves the bankruptcy court's summary jurisdiction of four counterclaims, three of which seek to recover voidable preferences, and one to recover from the claimant the purchase price of subscribed organizational stock of the bankrupt corporation. This latter claim does not appear to arise out of the same transaction on which the claim is based. The trial Court upheld the bankruptcy court's assumed summary jurisdiction of all the counterclaims on authority of Inter-State National Bank of Kansas City v. Luther, Trustee, 221 F.2d 382, cert. granted 350 U.S. 810, cert. dismissed by stipulation of parties, Id., 944.

In Inter-State, we upheld the power of the bankruptcy court to entertain a counterclaim to fully adjudicate and recover a §57(g) preference, whether such counterclaim is compulsory under Rule 13(a) or permissive under Rule 13(b), F.R.C.P. A majority of the court en banc took the view that the filing of a claim in bankruptcy operates to invoke the bankruptcy court's exclusive jurisdiction under §2(a)(2), to sift the circumstances surrounding any claim and allow or disallow it, according to equitable precepts. And, more specifically, the filing of the claim in bankruptcy operates to invoke the court's concurrent jurisdiction with the state courts under §60(b), to fully adjudicate and recover any voidable preference. See: Inter-State, supra, p. 389. We were furthermore of the opinion that the right to plenary suit being procedural, may be waived, i.e., see: O'Dell v. United States (10 CA), 326 F.2d 451, and having voluntarily invoked the summary jurisdiction of the bankruptcy court, the claimant could not thereafter limit the exercise of that jurisdiction over the subject matter by objection thereto. See: Inter-State, supra, p. 388; and Continental Casualty Co. v. White, 269 F.2d 213, 216. Cf: United Artists Corporation v. Masterpiece Productions, 221 F.2d 213.

Appellants concede that the three preferential counter-

claims are ruled by Inter-State, supra, and candidly say that insofar as that case sustains summary jurisdiction to grant affirmative relief on a counterclaim over the objection of the claimant, it is an unwarranted extension of jurisdiction by implied consent and should now be overruled. We heard this case en banc, to re-examine Inter-State in the light of the claim made for it here and because it presents an important question of bankruptcy administration, as to which there is a difference of opinion on this court and elsewhere.

Since Inter-State, other Circuits have considered the question of summary jurisdiction of counterclaims based upon consent implied by the filing of claims. Soon after Inter-State, the Seventh Circuit concurred in the view that the filing of a claim in the bankruptcy court gave consent to be sued on counterclaims arising out of the same transaction, but was of the view that such filing did not constitute implied consent to be sued "on an alleged cause of action arising out of a different subject matter." In Re Majestic Radio & Television Corporation, 227 F.2d 152, 156. The Fourth Circuit has also concurred in the view that the filing of a claim gave consent to the exercise of summary jurisdiction over a compulsory counterclaim, but had no occasion to decide whether the filing of a claim gave the court jurisdiction of an unrelated and permissive counterclaim. See: Continental Casualty Co. v. White, supra. The Ninth Circuit has upheld the jurisdiction of the bankruptcy court over a counterclaim, but agreed with the Seventh Circuit that the filing of a claim did not give consent to summary jurisdiction of a counterclaim not arising from the same transaction on which the claim was based. See: Peters v. Lines, 275 F.2d 919.

The most recent case involving the precise point is from the Second Circuit where, apparently on authority of Inter-State, supra, it sustained summary jurisdiction of a counterclaim for the surrender of a preference without

stating whether the counterclaim arose out of the same transaction. Judge Kaufman, speaking for that Court, reasoned that the filing of a claim in the bankruptcy court is analogous to the commencement of an action within the bankruptcy proceedings; that the Trustee's counterclaim was in the nature of an answer for affirmative relief by way of the surrender of a preference; and, that the claimant is deemed to have impliedly consented to the jurisdiction of the court toward complete relief. See: Nortex Trading Corporation v. Newfield, 311 F.2d 163. And see also: In the Matter of Farrell Publishing Corporation, Bankrupt, 130 F. Supp. 449; and Collier On Bankruptcy, Vol. 2, §§23.08[5], 23.08[6].[1]

Upon reconsideration of Inter-State, in the light of subsequent decisions and commentary, we have decided to adhere to its pronouncements. But, we decline to extend the summary jurisdiction of the court by implied consent to counterclaims which do not involve a preference, set-off, voidable lien, or a fraudulent transfer, and which are wholly unrelated to the creditor's claim. Claims of this nature are not within the Referee's summary jurisdiction, and a claimant does not consent to the exercise of the bankruptcy court's plenary jurisdiction by filing his claim in the bankruptcy proceedings. See: Collier On Bankruptcy, Vol. 2, §23.15.

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[1]Professor James William Moore, Editor-In-Chief of the 14th Edition of Collier On Banrkuptcy, treated Inter-State in a comprehensive article entitled RES JUDICATA AND COLLATERAL ESTOPPEL IN BANKRUPTCY, 68 Yale L.J. 1, 32. Professor Moore agrees with the majority of the court in Inter-State on two grounds: (1) Under the doctrine of Alexander v. Hillman, 296 U.S. 222, "equity once invoked will achieve complete relief." See also: Taylor v. Producers Pipe & Supply Co., 114 F.2d 785. (2) On the theory that a "sound construction of the Bankruptcy Act warrants complete adjudication." Id., p. 38. He also reasoned with the majority in Inter-State that "as an incident of its power to disallow claims, the bankruptcy court * * * has jurisdiction to determine a §57(g) issue raised by the Trustee, and by the same reasoning, to entertain a counterclaim recognized by §68, authorized by Rule 13, and based upon the §57(g) issue. * * *"

And see Case Notes, 60 Mich. L. Rev. 96; 69 Harvard L. Rev. 377.

The appellants also deny that the counterclaims are based upon a preference, on the ground that the Trustee failed to sustain the burden of proving that the bankrupt was insolvent when the transfers giving rise to the preference claim were made. But, there can be no doubt that appellants knew, or had reason to believe, that the corporation of which they were the progenitors and central figures was insolvent when they caused it to make payments to the bank, on notes on which appellant-Louis Katchen was an accommodation maker. The proof here fully meets the test set forth in Moran Brothers v. Yinger, 323 F.2d 699.

The judgment of the bankruptcy court is affirmed on all the counterclaims except the Trustee's counterclaim for the purchase price of the subscription stock.

SETH, Circuit Judge, concurring:

I concur in the foregoing opinion of the court as expressed by Chief Judge Murrah, and would like to state some considerations which I consider important in examining the action of the trial court and the referee.

The record shows that the bankrupt corporation began business in April 1960 with the appellant as a vice president, director, and stockholder. His two sons and a third party were the other stockholders and directors. The referee found that the appellant agreed to pay $10,000.00 for the one thousand authorized shares of the company, that he caused the shares to be issued to himself, his two sons, and a third party. The two sons and the third party then pledged their shares to the appellant and such pledge was in effect when the bankruptcy proceedings commenced. He further found that none of the pledgors ever paid anything to the company or the appellant for the pledged shares. It appears that the shares that the two sons were to receive were to be in the form of a gift from the appellant. Appellant was a vice president and director until his resignation on October 30, 1960.

In April 1960 the bankrupt borrowed $40,000.00 from the American National Bank and gave a note upon which appellant asserts that he was an accommodation maker. In June 1960 the bankrupt borrowed $10,000.00 on a note from the North Denver Bank. This note bore the typewritten name of the bankrupt and the signature of the appellant and two other stockholders without further designation or description. Appellant claims he is not an accommodation maker or personally liable on this $10,000.00 note.

The bankrupt suffered in August 1960 a fire loss, and thereafter the collections of the bankrupt were placed in a so-called trust account in the name of and under the sole control of the appellant. The appellant paid on October 13, 1960, from corporate funds in this trust account the sum of $14,599.00 and on November 18, 1960, the sum of $10,137.50 on the $40,000.00 note given to the American National Bank above referred to. Appellant admitted these payments served to diminish his personal liability, and that he knew this when he made the payments. The appellant from this trust fund further paid in September 1960 the sum of $10,162.50 to the North Denver Bank on the note described above.

The appellant filed in the bankruptcy proceedings two claims, one in the amount of $4,625.00 for unpaid rent on the premises which he owned and which were occupied by the bankrupt, and the second claim in the amount of $5,000.00 representing a payment to the bank from claimant's personal funds as an accommodation maker on the note of the corporate bankrupt given to the American National Bank described above.

The referee found that the payment of the corporate funds from the trust account on the bank notes constituted a preference received by the appellant, and repayment of the total of such payments was ordered. The referee fur-

ther ordered the appellant to pay the amount of $10,000.00 as an unpaid subscription for the corporate stock.

Against this background of business dealings, family relationships, and participation in the management of the bankrupt, the appellant filed his claims. The appellant made this filing not only with his complete and intimate knowledge of the corporate transactions which were involved, but also with what we must assume to be his knowledge of the law pertaining to the filing of such a claim.

Appellant, we must also assume, had knowledge that his claim would be heard before the bankruptcy court, and the scope of the hearing would include those subjects required by 11 U.S.C.A. §§ 96 and 93(g). This scope and issues of the summary hearing necessarily included, and the referee was required by law, to determine whether or not the disbursements of corporate funds made by the appellant to the banks in partial payment of the notes on which his signature appeared constituted a preference. This is clearly a part of the substantive law of bankruptcy. The hearing necessarily had to include sufficient testimony and evidence in order that the referee could decide whether or not there had been a preference to appellant. Such a determination in any case of this character would be binding by res judicata or by equitable estoppel in any subsequent plenary action. The plenary suit would thus be reduced to a mere formality except as to the dollar amount of the preference, and perhaps not even that. Schwartz v. Levine & Malin, 111 F.2d 81 (2d Cir.), held such amount was just as important for the bankruptcy court to determine as the nature of the payment because the allowance of the claim was conditional on repayment of the preference.

Thus under the circumstances it is certainly reasonable to believe that the appellant expected when he filed his claim that at least other payments on the same note also remitted by himself would be considered, and that the

whole matter was so interrelated that obviously the issue of preference would be litigated. This waiver is even clearer when made in a jurisdiction where Inter-State Nat'l Bank of Kansas City v. Luther, 221 F.2d 382 (10th Cir.), is the prevailing rule. There the question is exhaustively treated, and a claimant's position is clearly stated. This scope of the hearing is not a procedural matter but again is a matter of substantive bankruptcy law. The court cannot close its eyes to what the appellant did in the preference transaction and when considering what he did as a claimant. Both are matters of substantive bankruptcy law and both are matters for determination by the same court to accomplish a complete disposition of the issues before the equity court. The appellant by his claim submitted the entire question to the bankruptcy court, not just a portion of it. This is the reason why the substantive law relating to setoffs, fraudulent transfers, and similar transactions are handled in the manner they are. The claimant has a right to have his claims and relationships with the bankrupt determined. This right carries with it the expectation of a complete adjudication of his rights and preferences like any other litigation he may be involved in outside the bankruptcy field. This again really differs from setoffs, balancing of accounts, and fraudulent transfers only in the relative amounts involved. Any litigant or claimant when he enters any court room can expect to be met by counterclaims and by setoffs. The only choice such litigant has is whether or not he should become the moving party or wait and become a defendant. This can be a difficult decision but one faced by litigants frequently. The decision here is whether to become a moving party and also to submit the adjudication of claims and preferences to the bankruptcy court without a jury, or whether to forego the filing of his claim and wait to become a defendant. The bankruptcy proceeding, like the right to trial by jury, has its origin in the Constitution and they are to that extent of equal dignity. There is no question that Congress

under § 8 of Article 2 of the Constitution has the power to establish laws relative to the handling of claims and preferences. Since bankruptcy proceedings are of equitable nature, these claims, setoffs, voidable liens, and fraudulent transfers are handled by summary proceedings. This substantive law is such that when a claimant submits the disposition of his claim, he thereby submits to the adjudication by such court of all issues relating to his claim, and to any asserted preferences he may have received. His claim has to pass this statutory preference test.

As indicated above the determination of the issue of a preference is binding by res judicata on the parties in the event that plenary proceedings be commenced. Thus it would serve no useful purpose to try the same issue in such proceedings. This finality of decision in summary proceedings is an important factor in evaluating the issue before us at this time. The author of 3 Collier, Bankruptcy, 14th Ed., at ¶ 57-14, in discussion of allowance or disallowance of claims, states: "Where disallowance (pending surrender of preferences) is based on a voidable preference, the findings with regard to the preference are *res judicata* in the trustee's suit to recover the preference." The author further states on the issue of the power of the court: "But a litigated issue of jurisdiction, like other issues, may be conclusively adjudicated, and the fact that the court may exceed its jurisdiction, *e.g.*, the referee rendering an affirmative judgment on the trustee's counterclaim without the creditor's consent, does not preclude the judgment from having the effect of *res judicata:* the judgment may be erroneous and subject to reversal on appeal, but it is not void and subject to collateral attack." The Supreme Court in Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104, and in Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244, has held that the determination by the court of bankruptcy of its jurisdiction is res judicata in subsequent proceedings. The Second

Circuit in Schwartz v. Levine & Malin, 111 F.2d 81, stated that the determination or finding as to the preferential nature of a payment to the claimant made following the summary hearing on the claim is res judicata in a subsequent plenary action. In the cited case the court had before it such a plenary action and held that the trial court was correct in granting a summary judgment on the ground that the matter of the preferential nature of the payment had been determined in the bankruptcy court. The court there added, as above indicated in this opinion, that the amount of the payment was as important as the nature of the payment. Thus apparently the court would and did apply the doctrine of res judicata both as to the amount and character of the payment. The court concluded its opinion by stating: "All the conditions were fulfilled which made his findings res judicata, and there was nothing left to be decided in the action at bar," citing Fayerweather v. Ritch, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193. A similar holding appears in Giffin v. Vought, 175 F.2d 186 (2d Cir.), and in Johnson v. Wilson, 118 F.2d 557 (9th Cir.). A clear indication that the determination of the issue of preference during the hearing on the claim is not a matter of consent by the claimant, as indicated in In Re J. R. Palmenberg Sons, Inc., 76 F.2d 935, aff'd. sub nom. Bronx Brass Co. v. Irving Trust Co., 297 U.S. 230, 56 S.Ct. 451, 80 L.Ed. 657, where the court refused to let the claimant withdraw his claim when the bankruptcy court was in the process of considering the preference issue. Res judicata was further carefully considered by the state court in Feiring v. Gano, 114 Colo. 567, 168 P.2d 901. The bankruptcy court judgments have the same effect as those of other courts having general jurisdiction. The general principles relating to res judicata and equitable estoppel are applied. The issues which were or could have been adjudicated become significant. Professor Moore in his article on this subject in 68 Yale L.J. 33 states: "When, however, the trustee does interpose a section 57g defense

and the issue is decided against him, allowance of the claim bars his subsequent action to recover on the theory of a voidable transfer. For similar reasons, a decision in the trustee's favor on a section 57g defense concludes the issue against the creditor in a later plenary action brought by the trustee to recover the money or property preferentially or fraudulently transferred."

The trustee seems to have little choice as to summary or plenary actions. The author of 2 Collier, Bankruptcy, states in a footnote to ¶ 23.08: "It is immaterial that the bankruptcy trustee does not consent to the jurisdiction of the bankruptcy court with respect to a suit against him by an adverse claimant, since he is merely the court's officer and if the adverse parties consent that the matter be adjudicated by the bankruptcy court and the court so orders, the trustee's consent follows such order. Section 23 has no application. (Citing several cases)."

The appellant has waived by the filing of his claims in this action any right to object to the nature or the scope of the summary hearing insofar as it may cover claims and preferences. Such subjects are clearly within the substantive bankruptcy law, and he must abide by the decision of the court.

I concur in the opinion of the court as announced by Chief Judge Murrah on this point and also in its holding that there was no such waiver by the appellant as to the stock subscription, it being wholly outside the matter of claims and preferences.

PHILLIPS, Circuit Judge, whom Circuit Judges Lewis and Breitenstein join, in concurring in part and dissenting in part:

Where used herein the word "creditor" refers to a general creditor, who asserts a provable claim against a bankrupt's estate.

I start with the premise that a jury trial cannot be had in a proceeding before a referee in bankruptcy.

It is my opinion that the trustee cannot assert in a counterclaim to a claim filed by a creditor, a claim against the creditor, which, absent the filing of the claim by the creditor, the trustee could only have asserted in a plenary action in which the creditor would be entitled to a trial by jury, unless the creditor had consented to the summary determination of the trustee's claim by the referee; and further, that the filing of a claim by the creditor does not constitute such a consent.

It will be observed that what I say is restricted to a trustee's claim of a character, which, if asserted in an ordinary plenary action, the defendant thereto would be entitled to a jury trial. It is so restricted, because the claim asserted by the trustee in each of the several counterclaims here involved is of that character.

The reason for my conclusion may be simply stated. The right of a general creditor of the bankrupt to file a claim against the bankrupt estate, to have his claim determined, and, if allowed, to participate in the distribution of the bankrupt estate is a substantive and fundamental right. The privilege to exercise such a fundamental right may not be conditioned by a mere procedural rule on the surrender of another distinct and nonalternative fundamental right of the creditor. The other right here involved is a constitutional right of the creditor to have a claim asserted against him by the trustee, absent his consent to the summary disposition thereof by the referee, determined on a trial by jury in a plenary action. The creditor may not be compelled to choose between the exercise of two distinct and nonalternative fundamental rights by Rule 13 of the Federal Rules of Civil Procedure.

Moreover, I think what I have said is equally applicable where the trustee's counterclaim is for the recovery of an alleged unlawful preference.

If it is established that the creditor has received or acquired an unlawful preference, his claim against the bankrupt estate must be disallowed in toto, unless he surrenders such preference to the trustee (11 USCA § 93 (g)). The nonsurrendered preference is a bar to the allowance of the claim. It may not be used as a set off, either to reduce or extinguish the creditor's claim, but only to bar its allowance in toto; and the creditor may not effect the surrender of the preference in whole or in part by crediting on his claim the amount or value of the preference. To permit the unlawful preference so to be used as a setoff or credit would, in effect, give the creditor the benefit of the unlawful preference and result in his receiving more than his pro rata share in the assets of the bankrupt estate, to the detriment of the other creditors.[1] He must surrender his preference in its entirety, or forego the allowance of his claim. An exception has been recognized in certain cases, but only to the extent of crediting the dividend on his claim. It has been held where a creditor has been adjudged to surrender a preferential payment by a judgment of the bankruptcy court, which may be done when the creditor consents to a summary determination, and it is practical to ascertain the amount of the dividend to which the creditor will be entitled on his claim, the bankruptcy court may permit the creditor, if he is so advised, to prove his claim against the estate of the bankrupt, determine the amount of the dividend coming to the creditor, and by its final decree direct him to pay over the full amount of the preferential payment with interest, less the amount of his divi-

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[1]Irving Trust Co. v. Frimitt, D.C.N.Y., 1 F. Supp. 16, 17;
Remington on Bankruptcy, Rev. Ed., 1957, Vol 3, §§ 1455-1456;
Rotan Grocery Co. v. West, 5 Cir., 246 F. 685;
Walker v. Wilkinson, 5 Cir., 296 F. 850, 852.

dend.[2] But in no case could the creditor have credited against the amount to be surrendered as an unlawful preference more than the pro rata dividend he would be entitled to on his claim.

For the same reasons the claim of the creditor and the counterclaims of the trustee here may not be treated as mutual debts and credits and one set off against the other under 11 USCA § 108.

My conclusion is that the claims here asserted by the trustee for preferences have none of the characteristics of a setoff.

Moreover, it is my opinion that the trustee may not set up as a defense to a claim of a creditor an alleged, but not judicially established claim that the creditor had received or acquired an unlawful preference, which he had not surrendered, and have the alleged claim of an unlawful preference adjudicated by the referee in a summary proceeding; and then set up in an action to recover the unlawful preference the adjudication with respect thereto in the summary proceeding as res judicata. I do not think the trustee should be permitted to have his claim of an unlawful preference established in a summary proceeding, equitable in nature, and by the simple device of not praying for the recovery of the alleged preference, forever deprive the creditor of his right to have the trustee's claim determined on a jury trial in a plenary proceeding. Other-

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[2]Page v. Rogers, 211 U.S. 575, 581. In the opinion the court said:

"* * * In view of the fact that this suit was brought in the bankruptcy court itself, and a final decree is to be entered by the judge of that court, it is entirely practicable to avoid the circuitous proceeding of compelling the defendant to pay into the bankruptcy court the full amount of the preference which he has received, and then to resort to the same court to obtain part of it back by way of dividend. The defendant may be permitted, if he shall be so advised, to provie his claim against the estate of the bankrupt, and the bankrupt court then may settle the amount of the dividend coming to him, and the final decree may direct him to pay over the full amount of his preference, with interest, less the amount of his dividend. * * *"

wise, the trustee could do indirectly that which he could not do directly and thereby deprive the creditor of a jury trial on the claim of an unlawful preference.

Of course, what I have said is restricted to cases where the creditor's claim of right to retain what the trustee asserts he received or acquired as an unlawful preference is substantial and not merely colorable.[3]

A court of bankruptcy is in a strict sense a court of equity, except so far as is otherwise expressly provided in the Bankruptcy Act,[4] and its proceedings are governed by rules of practice in equity.[5]

The right to a jury trial in a matter involving both legal and equitable claims may not be taken away by the prior determination of the equitable claim. In Dairy Queen v. Wood, 369 U.S. 469, the court said:

> "The Federal Rules did not, however, purport to change the basic holding of Scott v. Neely that the right to trial by jury of legal claims must be preserved. Quite the contrary, Rule 38(a) expressly reaffirms that constitutional principle, declaring: 'The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate. Nonetheless, after the adoption of the Federal Rules, attempts were made indirectly to undercut that right by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of

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[3]Here, the trustee did not assert and the referee did not find that the creditor's claim of right to retain what the trustee asserted was an unlawful preference was merely colorable and not substantial.

[4]Young v. Higbee Co., 324 U.S. 204, 214;
Securities Comm'n v. U. S. Realty Co., 310 U.S. 434, 435;
Continental Motors Corporation v. Morris, 10 Cir., 169 F.2d 315, 317;
Rader v. Boyd, 10 Cir., 252 F.2d 585, 586.

[5]Pepper v. Litton, 308 U.S. 295, 304;
Luther v. United States, 10 Cir., 225 F.2d 495, 498.

this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally came before us in *Beacon Theatres, Inc. v. Westover*, a case which, like this one, arose from the denial of a petition for mandamus to compel a district judge to vacate his order striking a demand for trial by jury.

"Our decision reversing that case not only emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury but also limits the issues open for determination here by defining the protection to which that right is entitled in cases involving both legal and equitable claims. The holding in *Beacon Theatres* was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' * * *"

See, also, Meeker v. Ambassador Oil Corp., 375 U.S. 160.

This does not leave the trustee without an adequate remedy. He may apply to the referee for an order staying the proceedings on the claim, in order that he may commence and prosecute a plenary action to recover the alleged unlawful preference and if he establishes such preference and obtains a judgment for its recovery and the creditor does not surrender it to the trustee, the trustee may then set up the unsurrendered unlawful preference as a bar to the creditor's claim. That procedure has been approved by respectable authority.[6]

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[6]B. F. Avery & Sons Co. v. Davis, 5 Cir., 192 F.2d 255;
Triangle Electric Co. v. Foutch, 8 Cir., 40 F.2d 353, 357;
In re Continental Producing Co., D. C. Cal., 261 F. 627, 629;;
In re G. L. Odell Const. Co., D. C. Colo., 119 F. Supp. 578, 581.

Instances of the converse of the situation here presented will arise, and in my opinion should be considered. The trustee who asserts a claim for an unlawful preference may believe it would be to his advantage to have such claim determined by a jury trial in a plenary action. Assume that situation exists, that the person against whom the trustee's claim is asserted has filed a claim as a creditor against the bankrupt estate and that the two claims are so related that if Rule 13(a) of the Federal Rules of Civil Procedure is applicable, the trustee's claim is a compulsory counterclaim. May the creditor by filing his claim, through the operation of a procedural rule, deprive the trustee of his substantive right to a jury trial? I think the answer is obviously no.

What I have said in this opinion supplements my dissent in Inter-State National Bank of Kansas City v. Luther, 10 Cir., 221 F.2d 393, to which dissent I fully adhere.

Accordingly, I concur in the reversal of the referee's order, with respect to the counterclaim for the alleged unpaid stock subscription, and in all other respects dissent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. [redacted] 28

LOUIS KATCHEN,
Petitioner,

VS.

HYMAN D. LANDY, Trustee in Bankruptcy,
Respondent.

In the Matter of
KATCHEN'S BONUS CORNER, INC., Bankrupt

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 742

LOUIS KATCHEN,

Petitioner,

vs.

HYMAN D. LANDY, Trustee in Bankruptcy,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent prays that the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on September 9, 1964, be denied.

STATUTES INVOLVED

The statutory provisions involved are the following sections of the Bankruptcy Act: 2a, 11 U.S.C.A. 11; 2a(2), 11 U.S.C.A. 11(2); 2a(7), 11 U.S.C.A. 11(7); 2a(15), 11 U.S.C.A. (15); 57g, 11 U.S.C.A. 93(g); 60a, 11 U.S.C.A. 96(a); 60b, 11 U.S.C.A. 96(b); and 68, 11 U.S.C.A. 108. They are printed in Appendix A.

REASONS FOR DENYING THE WRIT

1. As is expressly stated in Rule 19 of the Supreme Court Rules, a review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Hence, as in the instant case, where there are no conflicting decisions in other Circuits and where there are no important questions of Federal law involved, a decision of a Circuit Court of Appeals is final, and a writ of certiorari should not be granted.

2. Contrary to the assertions of Petitioner, the decision of the court below is not in conflict with *Gill vs. Phillips*, 5th Cir., 337 F.2d 258, nor with *Avery vs. Davis*, 5th Cir., 192 F.2d 255. The *Gill* case, which was expressly determined upon the complex facts involved therein, involved an arrangement proceeding under Chapter XI of the Bankruptcy Act which culminated in bankruptcy, wherein Gill took certain action during the pendency of the arrangement and filed certain claims therein. In considering the filing of proofs of claim as constituting consent to the jurisdiction of the Referee, the court considered the case of *Avery vs. Davis*. The court found, however, that two of the claims filed in the *Gill* case were apparently based on the same financial transaction as the counterclaim, and, therefore, the matter of jurisdiction could not be disposed of simply by reference to the *Avery* case. The court, after reviewing the peculiar circumstances involved in the *Gill* case, concluded by stating:

> "In light of the ambiguous nature of the Trustee's pleadings, the absence of any assertion by the Trustee that the cause of action in his counterclaim arose out of the same transaction as Proof of Claim No. 48, the uncertainty as to the breadth of the *Avery* decision and the absence of argument as to its applicability, and the fact that Gill's Proof of Claim No. 48 was filed prior to the adjudicaton in bankruptcy, we do not feel justified in finding that Gill consented to the exercise

of summary jurisdiction. However, we do not intend our decision in this case to be interpreted to be as either an acceptance or repudiation of the 'same transaction' theory by this Circuit. We wish to reserve a decision on that question for a case that brings the issue squarely into focus."

In the *Gill* case, the court took the position that the *Avery* case is not clear where the claim and counterclaim are based on the same transaction, and that although the claim and counterclaim in *Avery* arose out of unrelated transactions, that distinction "was not the articulated rationale of the decision." The *Avery* case was based solely upon a finding that the claimant therein was in adverse possession of the property in question prior to bankruptcy under an adverse right of claim, rather than by a mere colorable claim, and, therefore, the rights to said property could not be summarily adjudicated. The *Avery* case does not consider or pass upon the issues or law as are involved in the present case, and hence cannot be in conflict therewith.

Contrary to Petitioner's assertion that other Circuits are in effect in conflict with the Tenth Circuit, citing *Continental Casualty Company vs. White*, 4th Cir., 269 F.2d 213; *In re Solar Manufacturing Corp.*, 3d Cir., 200 F.2d 327; *Peter vs. Lines*, 9th Cir., 275 F.2d 919, each of these cases in fact support the decision in the present case. Each of said cases dealt with a counterclaim arising out of the same transaction as that from which the proof of claim arose. Each of said cases was decided solely on the facts and issues presented and upon the principle that the filing of a proof of claim constitutes implied consent to the Bankruptcy Court's summary jurisdiction of a counterclaim arising out of the same transaction as the claim. *Peter vs. Lines* noted that it joined five other Circuits in adopting this principle of law. The mere fact that the Tenth Circuit has applied the principle of implied consent to counterclaims

involving preferences in no way conflicts with the authority heretofore established in the other Circuits.

Petitioner asserts that the case of *Majestic Radio vs. Dwyer*, 7th Cir., 227 F.2d 152, is in conflict with the decision of the Tenth Circuit. In the *Majestic* case, the claimant therein, a former director of the bankrupt corporation, filed a claim for goods sold the bankrupt. The Trustee asserted a counterclaim based upon a breach of claimant's fiduciary duty as a director. The Seventh Circuit found that the claim and counterclaim arose out of a different transaction, and further found that the counterclaim did not involve a preference or a fraudulent or voidable transfer, and therefore the filing of a proof of claim did not constitute implied consent to the summary jurisdiction of the Bankruptcy Court. The decision in the *Majestic* case is entirely consistent with the decision of the Tenth Circuit, and is in no way in conflict therewith.

The consistency and lack of conflict is demonstrated by the fact that the Tenth Circuit, in the instant case, upheld the jurisdiction of the Referee only as to the three claims involving preferences, and reversed the Referee and District Court as to the portion of the judgment for the non-preference claim relating to the purchase price of stock in the corporation, finding no summary jurisdiction in connection therewith.

3. The constitutional right to a jury trial has not been denied the Petitioner.

In filing proofs of claim in the Bankruptcy Court, Petitioner consented to the summary jurisdiction of the Bankruptcy Court, and thereby waived any right to a plenary action together with any right to a jury trial on the issues involved in such claims. He cannot thereafter complain of the Court's power to render a judgment against him on proper counterclaims asserted by the Trustee for the re-

covery of preferences. As Judge Seth, in his concurring opinion, stated:

> "The appellant has waived by the filing of his claims in this action any right to object to the nature or the scope of the summary hearing insofar as it may cover claims and preferences. Such subjects are clearly within the substantive bankruptcy law, and he must abide by the decision of the Court."

The Bankruptcy Court is a court of equity empowered under Section 2a(15) of the Bankruptcy Act, 11 U.S.C.A. a(15), to make such orders, issue such process and enter such judgments as may be necessary for the enforcement of the provisions of said Act. Petitioner was in no way prejudiced by the Referee's determination of the Petitioner's claims and counterclaims thereto and in no way would have benefited from a plenary suit in this case. As stated by Judge Seth:

> "Against this background of business dealings, family relations, and participation in the management of the bankrupt, the appellant filed his claims . . . . Appellant, we must also assume, had knowledge that his claim would be heard before the bankruptcy court, and the scope of the hearing would include those subjects required by 11 U.S.C.A. Sections 96 and 93(g). This scope and issues of the summary hearing necessarily included, and the referee was required by law, to determine whether or not the disbursements of corporate funds made by the appellant to the banks in partial payment of the notes on which his signature appeared constituted a preference. This is clearly a part of the substantive law of bankruptcy. The hearing necessarily had to include sufficient testimony and evidence in order that the referee could decide whether or not there had been a preference to appellant. Such a determination in any case of this character would be binding by res judicata or by equitable estoppel in any subsequent plenary action. The plenary suit would thus be reduced to a mere formality except as to the dollar amount of the preference, and perhaps not even that."

The decision of the Tenth Circuit gives full expression to the long-recognized doctrine stated in *Alexander vs. Hillman*, 296 U.S. 222, 80 L.Ed. 192, and approved in numerous cases thereafter that equity once invoked will render full and complete relief as between the petitioning parties to the Court.

4. The same questions are not in fact presented in the instant case as were presented in *Inter-State National Bank vs. Luther*, 10th Cir., 221 F.2d 382.

Although the majority opinion in the instant case relied upon its prior *Inter-State* decision, the effect of the decision in the instant case has been to limit the summary jurisdiction to specific instances; namely, to those wherein there is involved a preference, setoff, voidable lien or fraudulent transfer. Counterclaims wholly unrelated to the creditor's claim are expressly excluded from the summary jurisdiction of the Bankruptcy Court. The decision in the instant case in effect modifies and limits the nature and scope of the *Inter-State* case. Accordingly, there is no compelling reason for the granting of certiorari in the instant case as there may have been with regard to the *Inter-State* case.

It has been held that the Supreme Court will grant a writ of certiorari sparingly and only in extraordinary cases of peculiar gravity and general importance. The instant case is not of such general importance to the public, nor is it of such peculiar gravity as to warrant granting of certiorari.

5. Contrary to the assertion of Petitioner, there is abundant statutory authority granting the Bankruptcy Court summary jurisdiction of a counterclaim based on a preference against a claimant, whether or not the counterclaim arose out of the same transaction as the claim.

The Bankruptcy Act establishes courts of bankruptcy,

as defined therein, and specifically invests them within their respective territorial limits with such jurisdiction at law or equity as will enable them to exercise original jurisdiction in proceedings under the Act for purposes stated in the Act. Bankruptcy Act, Section 2a, 11 U.S.C.A. 11.

The Bankruptcy Act also contains a blanket jurisdictional provision empowering the Bankruptcy Court to make such orders, issue such process and such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the Act. Bankruptcy Act, Section 2a(15), 11 U.S.C.A. (15).

The Federal District Court, as a court of bankruptcy, has general jurisdiction over controversies relating to the estate in bankruptcy. Bankruptcy Act, Section 2a(7), 11 U.S.C.A. 11(7). It can therefore determine any controversies in that field as against one who invokes its determination or consents to the exercise of jurisdiction. Such "consent" to jurisdiction can be conferred by one who voluntarily seeks determination of rights in the Bankruptcy Court as by filing a proof of claim. The Bankruptcy Court has exclusive and summary jurisdiction to allow or disallow claims against the bankrupt estate. Bankruptcy Act, Section 2a(2), 11 U.S.C.A. 11(2). In the exercise of that jurisdiction, it "sits as a court of equity" clothed with jurisdiction "to sift the circumstances surrounding any claim, to see that injustice or unfairness is not done in administration of the bankrupt estate." *Pepper v. Litton*, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281.

Section 57g of the Bankruptcy Act, 11 U.S.C.A. 93(g) provides that claims of creditors who have received or acquired void or voidable preferences are not allowable unless such creditors shall surrender such preferences. Section 60a, 11 U.S.C.A. 96(a), defines a void or voidable preference, and Section 60b, 11 U.S.C.A. 96(b) provides that such preferences may be voided by the Trustee.

As Judge Murrah stated in the *Inter-State* decision:

> "It is only a short and to us a perfectly valid jurisdictional step from the summary power to adjudicate a voidable preference and summary power to grant affirmative relief thereon, especially when the authorized adjudication has a binding effect in a plenary suit. Certainly the exercise of this affirmative equitable jurisdiction is within the substantive provision of the Bankruptcy Act providing for the disallowance of claims tainted with a preference."

The purpose of a plenary suit in bankruptcy administration is to seek recovery from one who has not voluntarily submitted himself to the jurisdiction of the Bankruptcy Court. Such a suit is not necessary against one who has of his own volition submitted his claims in connection with a certain transaction to the determination of the Bankruptcy Court. The filing of such a claim operates to invoke the Court's concurrent jurisdiction with the State courts under Section 60b to adjudicate and recover any voidable preference.

As an incident to its powers to disallow claims, the Bankruptcy Court has jurisdiction to determine issues raised by the Trustee under Section 57g, and, by the same reasoning, to entertain a counterclaim raised by Section 68 of the Bankruptcy Act, 11 U.S.C.A. 108, authorized by Rule 13 of the Federal Rules of Civil Procedure, and based on the Section 57g issue. Rule 13 would seem to make it incumbent upon the Trustee to allege any counterclaim which falls within Rule 13a and to give him the right to allege any counterclaim which is included within Rule 13b.

Section 2a(7) of the Bankruptcy Act, referred to by Petitioner and upon which objection to summary jurisdiction is claimed to have been made, has no applicability in the instant case. As stated in *Continental Casualty Company vs. White*, 4th Cir., 269 F.2d 213:

> "The Section quoted above was enacted to clarify and limit the effect of the *Cline* case *(Cline vs. Kaplan,*

323 U.S. 97, 65 S.Ct. 155, 89 L.Ed. 97). We are of the opinion that this amendment was intended by Congress to apply to situations similar to *Cline vs. Kaplan* where the adverse party is involuntarily brought into court by preemptory process such as a turnover, and was not meant to diminish the jurisdiction of the bankruptcy court where the creditor has come into court voluntarily by filing a claim against the estate. There is nothing to indicate that the statute was designed to authorize a party to object to the summary jurisdiction where he has come into court on his own motion seeking relief."

6. There is no important question of Federal law involved in the instant case which should be settled by this Court.

When Petitioner appealed to the Circuit Court from the decision of the District Court and the Referee in Bankruptcy, there were four claims upon which judgment totaling $44,899.00 had been rendered against Petitioner, to-wit:

(1) Preference by reason of payment by the bankrupt to the American National Bank on October 13, 1960, in the sum of $14,599.00.

(2) Preference by reason of payment by the bankrupt to said American National Bank on November 18, 1960, in the sum of $10,137.50.

(3) Preference by reason of payment by the bankrupt to the North Denver Bank, on September 13, 1960, of $10,162.50.

(4) Amount agreed to be paid by Petitioner for the capital stock of the corporation of $10,000.00.

When the Tenth Circuit Court of Appeals passed upon the decision of the District Court, it affirmed the judgment of the District Court as to the first three claims; namely, those relating to preferences, but declined to do so as to the fourth claim, asserting that it was not within the summary

jurisdiction of the Bankruptcy Court. As a result, the judgment against Petitioner was confined to the counterclaims of the Trustee which arose out of preferences.

As stated in *Peter vs. Lines*, at least six other Circuits have heretofore held that a claimant invokes the jurisdiction of the Bankruptcy Court to render an affirmative judgment in summary proceedings on a counterclaim of the Trustee arising out of the same transaction.

Hence, the only aspect of the decision of the Circuit Court which has not been frequently considered and consistently determined is that relating to the claim of preference resulting from payment to the North Denver Bank of $10,162.50.

General Order 37 of the Bankruptcy Act sets forth that "in proceedings under the Bankruptcy Act, the Rules of Civil Procedure for the District Courts of the United States shall, insofar as they are not inconsistent with the Act or with these General Orders, be followed as nearly as may be." Under Rule 13 of the Federal Rules of Civil Procedure, subdivision a, relating to compulsory counterclaims, requires the assertion of a counterclaim as to any claim which arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. Subdivision b, relating to permissive counterclaims, states that "a pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence which is the subject matter of the opposing party's claim."

The preferences involved in the payments to the American National Bank were included in the counterclaim filed by the Trustee as required under Rule 13a of the Federal Rules of Civil Procedure, inasmuch as they arose out of the same transaction which was the subject matter of one of Petitioner's claims in the Bankruptcy Court. Under the provisions of the Bankruptcy Act, Trustee had no choice in the matter. If he did not incorporate the claim arising out

of the payments to the American National Bank in his counterclaim, he would have been precluded from asserting this claim in any other proceeding.

The courts have heretofore had no hesitancy in permitting the Bankruptcy Court to exercise summary jurisdiction in this type of situation. The courts, as did the Tenth Circuit in the instant case, should have no hesitancy to exercise summary jurisdiction under Rule 13b over a permissive counterclaim relating to a preference such as the payment to the North Denver Bank, a counterclaim involving the same issues as were involved in the compulsory counterclaims relating to the American National Bank payments.

The propriety of extending the summary jurisdiction of the Bankruptcy Court to the preference involved in the payment to the North Denver Bank was, no doubt, of importance to Petitioner. However, the granting of a writ of certiorari requires more. As stated by Justice Taft in the case of *Layne vs. Bowler Corporation*, 261 U.S. 387, 67 L.Ed. 712:

> "It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."

The present case, Respondent submits comes under neither heading.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATUTES

Section 2a of the Bankruptcy Act, 11 U.S.C.A. 11:

"The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—"

Section 2a(2) of the Bankruptcy Act, 11 U.S.C.A. 11(2):

"Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;"

Section 2a(7) of the Bankruptcy Act, 11 U.S.C.A. 11(7):

"Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an

answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;"

Section 2a(15) of the Bankruptcy Act, 11 U.S.C.A. (15):

"Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: Provided, however, That an injunction to restrain a court may be issued by the judge only;"

Section 57g of the Bankruptcy Act, 11 U.S.C.A. 93(g):

"The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances."

Section 60a of the Bankruptcy Act, 11 U.S.C.A. 96(a):

"A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

Section 60b of the Bankruptcy Act, 11 U.S.C.A. 96(b):

"Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his

agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: Provided, however, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

Section 68 of the Bankruptcy Act, 11 U.S.C.A. 108:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

NO. 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

LOUIS KATCHEN,
Petitioner,

vs.

HYMAN D. LANDY, Trustee in Bankruptcy,
Respondent.

In the Matter of
KATCHEN'S BONUS CORNER, INC., Bankrupt

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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NO. 28

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OPINION BELOW

The opinion of the Court of Appeals (R. 8-23) is reported at 336 F.2d 535.

JURISDICTION

The judgment of the Court of Appeals was entered September 9, 1964 (R. 23). The petition for a writ of

certiorari was filed December 7, 1964, and was granted April 26, 1965. Jurisdiction is based on 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Does any Act of Congress grant to a referee in bankruptcy the power to exercise summary jurisdiction over a counterclaim by the trustee against a claimant where the claimant objects to summary jurisdiction?

Does the guarantee of the Seventh Amendment of trial by jury prevent the exercise of summary jurisdiction over a counterclaim by the trustee against a claimant where that guarantee would be fully applicable except for the filing of the claim in the bankruptcy proceeding?

CONSTITUTION AND STATUTES INVOLVED

The constitutional provision in question is Article VII of the Amendments to the United States Constitution:

"Jury trial in civil actions.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The statutory provision involved are Sections 60(b) and 2(a)(7) of the Bankruptcy Act, 11 U.S.C. Sections 96(b) and 11(a)(7). They are printed in Appendix A.

STATEMENT

This is a voluntary bankruptcy proceeding involving Katchen's Bonus Corner, Inc., a Colorado corporation (R. 2). The controversy here began when petitioner filed two claims in the bankruptcy proceeding (R. 5, 6). The trustee then filed counterclaims against petitioner. Petitioner promptly objected to the summary jurisdiction of the ref-

eree (R. 2). The objection was overruled by the referee who held that petitioner, by filing the claims, consented to his summary jurisdiction (R. 2). Judgment on the counterclaims was entered by the referee (R. 4, 5). Whether the referee had the right to exercise summary jurisdiction is the question presented.

In April, 1960, the bankrupt corporation borrowed $40,000 from the American National Bank and gave its note upon which petitioner was an accommodation maker. In June, 1960, the corporation borrowed $10,000 from the North Denver Bank, giving a note upon which petitioner was again an accommodation maker (R. 2, 3).

In October and November, 1960, the bankrupt corporation made payments of $24,736.50 on the $40,000 note at the American National Bank. In September, 1960, the bankrupt made a payment of $10,162.50 on the note at the North Denver Bank. These payments were made within four months of the filing of the petition in bankruptcy (R. 3, 4).

After the bankruptcy proceeding began, petitioner filed two claims. The first was for $5,000 representing a payment made by him as an accommodation maker on the $40,000 note at the American National Bank. The second claim was for $4,625 for rent due to him from the bankrupt (R. 1, 5, 6).

After these claims were filed, the trustee filed counterclaims against petitioner. The trustee asserted the petitioner had received preferential transfers when the bankrupt made the $24,736.50 payments on the American National Bank note and the $10,162.50 payment on the North Denver Bank note. The trustee further claimed that petitioner owed $10,000 because he had promised to pay the bankrupt that amount for capital stock (R. 1, 4). After a summary trial on the various factual issues, the referee made findings of fact and entered judgment for the trustee

against petitioner on all of these counterclaims (R. 5). The District Court adopted all of the findings and conclusions of the referee and affirmed the judgment (R. 6).

The Tenth Circuit, en banc, unanimously reversed the $10,000 judgment based on the promise to pay for capital stock holding that the filing of a claim does not give the referee summary jurisdiction over counterclaims which do not involve a preference, set-off, voidable lien, or a fraudulent transfer, and which are wholly unrelated to the creditor's claim. However, by a 4-3 decision, the Court "upheld the power of the bankruptcy court to entertain a counterclaim to fully adjudicate and recover a Section 57(g) preference [preferential transfer] whether such a counterclaim is compulsory under Rule 13(a) or permissive under Rule 13(b), F.R.C.P." (R. 9, 11).

SUMMARY OF ARGUMENT

This Court has ruled several times that a referee in bankruptcy has summary jurisdiction only to the extent specificaly granted by Congress. There is no Act granting such jurisdiction over a counterclaim by a trustee against a claimant, where the claimant objects to the summary hearing. The Supreme Court has in fact held, in circumstances as exist here, that summary jurisdiction does not exist and that a plenary trial must be held. Since those decisions, there has been no change in the Bankruptcy Act which would justify the holding below.

Amendment VII of the Constitution guarantees trial by jury. The law is clear that petitioner (had he not filed a claim) would be entitled to a trial by jury in an action by the trustee to recover preferential transfers. Yet, the court below held that petitioner, by filing a claim in the bankruptcy proceedings, gave up that right. Thus, a claimant is given the choice of giving up his fundamental right to file and recover on a claim in bankruptcy or giving up his constitutional right to trial by jury on a counterclaim.

Such a condition on this constitutional right violates Amendment VII.

I. NO ACT OF CONGRESS GRANTS TO A REFEREE IN BANKRUPTCY THE POWER TO EXERCISE SUMMARY JURISDICTION OVER A COUNTERCLAIM BY THE TRUSTEE AGAINST A CLAIMANT WHERE THE CLAIMANT OBJECTS TO SUMMARY JURISDICTION.

This case concerns the summary jurisdiction of the referee in bankruptcy. The Court below held that the referee had summary jurisdiction to enter judgments against petitioner on the "counterclaims" based on preferential transfers. Petitioner contends that the referee is without such jurisdiction and that the trustee must bring an independent action with the rights of a plenary trial, including a jury.

There is no dispute that a trustee cannot in a summary proceeding recover a judgment against a person who has not consented or who has entered no sort of appearance in the bankruptcy proceeding. *Cline v. Kaplan*, 323 U.S. 97. The issue here is whether petitioner, by filing claims, thereby consented to the referee's summary jurisdiction on counterclaims, even though petitioner promptly objected to the summary jurisdiction after the counterclaims were filed (R. 2). Petitioner contends that no section of the Bankruptcy Act and no decision of this Court permits summary jurisdiction.

Historically, this court has been called upon from time to time to remind the lower courts that summary jurisdiction exists only when expressly authorized.

Thus, in an early case, *Ester v. Gaff*, 91 U.S. 521, 525, this Court said:

> "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all con-

> trol of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except so far as the Circuit Courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of dispute rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. * * *"

The view of this Court has not changed through the years. In *Bardes v. Hawarden Bank*, 178 U.S. 524, the trustee brought an action in federal district court to set aside a fraudulent transfer made within four months before institution of bankruptcy proceedings. The Court, after extensive review of the Bankruptcy Act, held that there was no federal court jurisdiction (where under the Act at that time the claim of federal court jurisdiction was dependent upon the same argument as the claim of summary jurisdiction here).

A case close in point to the present one is *Pickens v. Roy*, 187 U.S. 177, 130. Roy had filed a claim in the bankruptcy proceedings just as did petitioner here. The trustee then sought in federal court an order for Roy to turn over property allegedly belonging to the bankrupt. This court held that the filing of the claim did not amount to a consent to the exercise of jurisdiction by the federal court.

In *Louisville Trust Company v. Comingor*, 184 U.S. 18, 25, the referee ordered a state court receiver to pay over certain sums of money to the trustee, although the receiver objected to the jurisdiction of the referee. It was held that without consent, there was no jurisdiction:

> "The proceeding was purely summary. The determination of the merits on the facts was not open to revision by appeal or writ of error under the bankrupt law. If Comingor had been entitled to a trial by

jury, he could not have obtained it as of right. The collection of the amounts found due would be enforcible not by execution but by commitment."

The eighth circuit was reversed in *Galbraith v. Vallely*, 256 U.S. 46, a case which govern the present dispute. Prior to bankruptcy, the bankrupt had made an assignment for the benefit of his creditors to Galbraith who performed as trustee. Shortly thereafter, the debtor was declared bankrupt. Galbraith appeared in the bankruptcy proceedings and filed an account, claiming therein the right to retain a certain sum for fees and disbursements under the assignment, and paid over to the trustee the other moneys he had acquired. Thereupon, the trustee filed a counterclaim asking, in a summary proceeding, for an order upon Galbraith to show cause why he should not pay over the sum of $1,474.10 retained as fees and expenses. Galbraith unsuccessfully challenged the jurisdiction of the referee to hear the counterclaim. This Court held that there was no jurisdiction, page 50:

> "It may be, as suggested by the Circuit Court of Appeals, that a summary proceeding at the instance of the trustee would afford a more speedy and economical administration of the estate in bankruptcy. But the right to recover in such instances, only in suits of the ordinary character, with the rights and remedies incident thereto, has been consistently maintained by this court. * * *"

The argument that Galbraith had waived his right to a plenary trial was rejected.

The second circuit was reversed in *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426. The creditor had obtained a judgment within four months of bankruptcy and the sheriff had taken possession of some property in execution. The trustee sought, by a summary proceeding before the referee, to have the lien on execution declared void and to obtain possession of the property. Although the creditor objected to the jurisdiction, judgment was rendered. This Court held there there was no summary jurisdiction.

Once more this Court restated the right to a plenary trial in *Daniel v. Guaranty Trust Co.*, 285 U.S. 154, 161:

> "In the circumstances, did the referee have jurisdiction to enter the turnover order against the trust company? The answer must be 'No' unless that company by filing its petition for reclamation entered its general appearance and in effect consented to submit itself to summary proceedings before that officer in respect of matters having no immediate relation to the claim which it had presented.
>
> "In practice such a rule might lead to unfortunate complications and deprive owners of property of fair opportunity to recover. The risk incident to a general appearance and consent to adjudication of claims of all kinds might easily deter where the right to recover is clear. Moreover, the choice would not be between tribunals merely, but between the ordinary processes of a plenary suit and a summary hearing. We are not cited to any opinion by an appellate court which definitely approves the view advanced by the petitioner. We cannot conclude that the demand for speedy administration of bankrupt estates is enough to justify such a radical departure from ordinary procedure. And the suggestion that it is possible to impose equitable terms as a condition to an order of reclamation is not helpful. No such conditional order was proposed or entered."

The last decision in the series in *Cline v. Kaplan*, 323 U.S. 97, where the question was merely whether Kaplan had objected soon enough to summary jurisdiction on a turn over order. The Court determined that the objection made prior to the final order was timely.

Thus, it is clear that this Court has consistently held that there is no summary jurisdiction of lawsuits between the trustee and an adverse litigant unless the adverse party consents (with some exceptions not pertinent). And on at least two occasions it has been held that the filing of a claim or petition in the proceeding does not constitute a consent to summary jurisdiction of a counterclaim.

In spite of these decisions, the history is again being repeated, and the lower federal courts are once more holding that the referee has summary jurisdiction where this court has held it did not exist. The first 10th Circuit case was *Inter-State Bank v. Luther*, 221 F.2d 382, where judgment was entered on a counterclaim against a claimant based on a voidable preference, even though the claimant objected. That Court reasoned that there was implied consent to summary jurisdiction by the filing of a claim. The Supreme Court granted certiorari in that case, 350 U.S. 810. Certiorari was dismissed by stipulation of the parties in the *Luther case*, 350 U.S. 944.

Nor is the Tenth the only circuit extending summary jurisdiction, although different rules have been adopted by the circuits. Thus, the 10th has ruled for jurisdiction of any counterclaim based on a preferential transfer whether the counterclaim is "compulsory" or "permissive." The Fifth Circuit reached the opposite conclusion in *Gill v. Phillips*, 337 F.2d 258, and *Avery v. Davis*, 192 F.2d 255, although on rehearing in the *Gill* case, that Court indicated it might find jurisdiction if the counterclaim were compulsory, 340 F.2d 318.

The Seventh Circuit in *In re Majestic Radio*, 227 F.2d 152, held that summary jurisdiction did not exist over a permissive counterclaim against a claimant. Other circuits have permitted summary jurisdiction of some compulsory counterclaims, but in so holding have carefully noted that they were not permissive. *Continental Casualty Company v. White*, 4 Cir., 269 F.2d 213; *In re Solar Manufacturing Corporation*, 3 Cir., 200 F.2d 327; *Peters v. Lines*, 9 Cir., 275 F.2d 919.

We believe that there is no justification for the Circuits to allow summary jurisdiction and that once more this Court must rule that there is no such jurisdiction. The only reason for ignoring the decisions of this Court would be a

change in the Bankruptcy Act. But there has been no such change.

It is most difficult to review the various sections of the Act to show that summary jurisdiction is not granted. It is even more difficult because the majority opinions in this case and in the *Luther* case nowhere state just what sections are relied upon. See *Inter-State Bank v. Luther*, 221 F.2d 390.

Section 23 of the Bankruptcy Act, 11 U.S.C. 46, provides for federal court jurisdiction in cases between trustees and adverse claimants to the same extent as though the proceedings had been between the bankrupt and the claimant. Section (b) provides for concurrent federal court jurisdiction on controversies about preferential transfers. But this section confers plenary jurisdiction, not summary. See *Taubel-Scott-Kitzmiller Co., v. Fox*, 264 U.S. 426, 431.

Section 60(b), 11 U.S.C. 96(b) states that preferential transfers may be avoided by the trustee, and provides for concurrent federal and state court jurisdiction "where plenary proceedings are necessary."

There is not a single section of the Bankruptcy Act which confers summary jurisdiction in this situation. The only change relating to jurisdiction after the last decision of this Court is the amendment to Section 2a(7), 11 U.S.C. 11, to provide that "where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction." This was apparently designed to change the rule in *Cline v. Kaplan*, 323 U.S. 97, that objection to summary jurisdiction could be made anytime prior to the determination by

the referee. This does not confer summary jurisdiction here because petitioner objected promptly to the proceeding before the referee (R. 2).

It is hinted, in the majority opinion in the *Luther* case, that Section 2 of the Act, 11 U.S.C. 11, which created the Courts of Bankruptcy, together with the sections on voidable preferences somehow confer summary jurisdiction. But this argument has previously been rejected by the Supreme Court. *Lathrop v. Drake*, 91 U.S. 516. *Bardes v. Hawarden Bank*, 178 U.S. 524, 531; *Daniel v. Guaranty Trust Co.*, 285 U.S. 154, 162.

Clearly, the Bankruptcy Act does not confer summary jurisdiction in this case.

The next question is whether there is something different about the counterclaims here because they are based on alleged preferential transfers. The Tenth Circuit has ruled that counterclaims involving preferences should be treated differently. See *Inter-State Bank v. Luther*, 221 F. 2d 382, 389; *Katchen v. Landy*, (R. 15). It is argued that it is the duty of the trustee to void preferential transfers under Section 60(b) and that a claim of a creditor cannot be allowed unless the creditor surrenders any preferences under Section 57g. Then it is asserted that the determination by the referee under Section 57g, disallowing the claim because of a preferential transfer to claimant would result in the preference issue being res judicata in a subsequent plenary action between the claimant and the trustee. Thus, the argument continues, it would be absurd to require a plenary action.

This reasoning, of course, begs the question. If the referee does not have summary jurisdiction, then his determination of the preference issue could not be res judicata because that determination would be a nullity.

This exact argument was long ago rejected by the Supreme Court in *Taubel-Scott-Kitzmiller Co. v. Fox*, 264

U.S. 426. There the referee in a summary proceeding voided a preferential lien held by a creditor and ordered the property delivered to the trustee. This Court said, page 435:

> "The argument is that, since the bankruptcy court is expressly empowered to order that a lien void as against the trustee shall be preserved for the benefit of the estate, it was given, by implication, jurisdiction to determine whether the lien is void. The argument proceeds upon a misapprehension of the nature and purpose of the clause in question. *It does not confer jurisdiction.* It confers substantive and adjective rights. * * *" (Emphasis Supplied.)

Likewise, in this case, the preferential transfer sections of the Bankruptcy Act do not confer summary jurisdiction.

One additional issue in this case is whether there should be any jurisdictional distinction between "compulsory" counterclaims and "permissive" counterclaims brought by the trustee against the claimant. Some Courts of Appeal have made the distinction. See *In re Solar Manufacturing Corporation*, 3 Cir., 200 F.2d 327; *In re Majestic Radio*, 7 *Cir.*, 227 F.2d 152. The Tenth is perhaps the only Circuit which permits summary jurisdiction over any preference counterclaim, even if it is permissive (R. 9).

It should be noted that the transfers to the American National Bank by the bankrupt corporation might be considered to arise out of the same transaction as the claim filed by petitioner for his own payment to this bank (R. 5, 6). The transfer by the bankrupt to the North Denver Bank did not arise out of any transaction involving either of the claims filed by petitioner.

We believe there is no greater ground for summary jurisdiction of a compulsory counterclaim than of a permissive one. In fact, this Court effectively disposed of this question in *Galbraith v. Vallely*, 256 U.S. 46, where Galbraith filed a claim for services as assignee for the benefit of creditors which services were performed just prior to

bankruptcy. The trustee counterclaimed for monies withheld by Galbraith in payment of these same services. Clearly, such a counterclaim would be described as compulsory. Yet, this Court held that there was no summary jurisdiction of the counterclaim.

Hence, it is of no aid to summary jurisdiction that two of the counterclaims here may be compulsory. Actually, to even describe such a counterclaim as compulsory is inaccurate where there is no jurisdiction in the referee to determine the matter.

The Tenth Circuit, in extending summary jurisdiction, placed reliance on *Alexander v. Hillman*, 296 U.S. 222. This was federal equity receivership proceeding in district court. The claimants filed and proved claims to shares in the distribution of the receivership property. The receiver counterclaimed for certain relief cognizable in equity. The claimants challenged the jurisdiction, but this Court held that there was jurisdiction in the district court to determine the counterclaims. We think that case is no authority here. It was a proceeding in equity, not a summary proceeding in bankruptcy. Further, the real issue was probably one of venue—whether the counterclaims had to be brought in Pennsylvania where all respondents resided. Certainly, this Court in that decision did not overrule its many previous rulings on summary jurisdiction in bankruptcy.

This Court has repeatedly held that a referee has summary jurisdiction only to the extent specifically granted by Congress. There is no Act granting a referee summary jurisdiction of a counterclaim by the trustee against a claimant, where the claimant objects. The court below was in error in holding that the referee had summary jurisdiction.

II. AMENDMENT VII OF THE CONSTITUTION, WHICH GUARANTEES A TRIAL BY JURY, IS VIOLATED IF THE BANKRUPTCY ACT GIVES A REFEREE SUMMARY JURISDICTION OVER A COUNTERCLAIM AGAINST A CLAIMANT.

Even if there were a statutory basis for summary jurisdiction, the decision below could not be sustained under the Seventh Amendment.

Three judges in the court below were of the opinion that petitioner was denied his constitutional right to a jury. Judge Phillips, writing the dissent, said as follows (R. 18):

"I start with the premise that a jury trial cannot be had in a proceeding before a referee in bankruptcy.

"It is my opinion that the trustee cannot assert in a counterclaim to a claim filed by a creditor, a claim against the creditor, which, absent the filing of the claim by the creditor, the trustee could only have asserted in a plenary action in which the creditor would be entitled to a trial by jury, unless the creditor had consented to the summary determination of the trustee's claim by the referee; and further, that the filing of a claim by the creditor does not constitute such a consent.

"It will be observed that what I say is restricted to a trustee's claim of a character, which, if asserted in an ordinary plenary action, the defendant thereto would be entitled to a jury trial. It is so restricted, because the claim asserted by the trustee in each of the several counterclaims here involved is of that character.

"The reason for my conclusion may be simply stated. The right of a general creditor of the bankrupt to file a claim against the bankrupt estate, to have his claim determined, and, if allowed, to participate in the distribution of the bankrupt estate is a substantive and fundamental right. The privilege to exercise such a fundamental right may not be conditioned by a mere procedural rule on the surrender

of another distinct and nonalternative fundamental right of the creditor. The other right here involved is a constitutional right of the creditor to have a claim asserted against him by the trustee, absent his consent to the summary disposition thereof by the referee, determined on a trial by jury in a plenary action. The creditor may not be compelled to choose between the exercise of two distinct and nonalternative fundamental rights by Rule 13 of the Federal Rules of Civil Procedure."

There can be no doubt that if petitioner had not filed a claim, the trustee would have had to bring a plenary action to recover the alleged preferential transfer, and petitioner would have been entitled to a trial by jury. Section 60(b) of the Bankruptcy Act, 11 U.S.C. 96(b); *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 266; *Louisville Trust Company v. Comingor*, 184 U.S. 18, 25. And as these cases note, there is no provision for a trial by jury in a summary proceeding before a referee.

We know of no case in which this Court has ruled on whether the right to a jury trial can be conditioned on a claimant giving up his claim. However, in several decisions the Court has indicated that such a condition could not be imposed.

Thus, in *Louisville Trust Company v. Comingor*, 184 U.S. 18, 25, this Court ruled against summary jurisdiction on a counterclaim against a claimant. One of the reasons set forth was that "If Comingor had been entitled to a trial by jury, he could not have obtained it as of right."

In *Ester v. Gaff*, 91 U.S. 521, 525, the creditor was held not to lose his right to a plenary trial due to the bankruptcy of his adversary.

In *Daniel v. Guaranty Trust Co.*, 285 U.S. 154, 162, in declining to approve summary jurisdiction said: "In practice such a rule might lead to unfortunate complications and deprive owners of property of fair opportunity to re-

cover. The risk incident to a general appearance and consent to adjudication of claims of all kinds might easily deter where the right to recover is clear. Moreover, the choice would not be between tribunals merely, but between the ordinary processes in a plenary suit and a summary hearing. * * *" See also *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 266, 267.

The majority opinion in the court below fails to mention the jury issue. But the concurring opinion of Judge Seth states that "The bankruptcy proceeding, like the right to trial by jury, has its origin in the Constitution and they are to that extent of equal dignity." (R. 15). The surprising implication is that the Bill of Rights does not apply to bankruptcy proceedings. This is not correct. For instance, this Court has held that the Fifth Amendment applies to Bankruptcy law, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602.

Nor is there any reason to suppose that a jury trial is a lesser right than due process. The same Section 8 of Article I of the Constitution grants Congress exclusive power over the District of Columbia, as grants Congress the power to establish uniform laws on bankruptcies. The power over the District has been called sovereign and plenary. Yet, this Court has held that the provisions of the constitution on jury trial are applicable to the District of Columbia. *Callan v. Wilson*, 127 U.S. 540, *Capital Traction v. Hof*, 174 U.S. 1, 5.

The majority below held that, because the counterclaims were joined in the proceeding with the claims where no jury is provided, there would be no jury on the counterclaims either, even though otherwise there would be a right to a jury on the counterclaim issues. The situation is no different than a lawsuit in which a claim cognizable only at law is united in the same case with a claim for equitable relief. This Court has held that the Seventh Amendment

requires a jury trial on the law issues. In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 471, the Court said:

> "The Federal Rules did not, however, purport to change the basic holding of Scott v. Neely that the right to trial by jury of legal claims must be preserved. Quite the contrary, Rule 38(a) expressly reaffirms that constitutional principal, declaring: 'The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.' Nonetheless, after the adoption of the Federal Rules, attempts were made indirectly to undercut that right by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally came before us in Beacon Theatres, Inc. v. Westover, a case which, like this one, arose from the denial of a petition for mandamus to compel a district judge to vacate his order striking a demand for trial by jury.
>
> "Our decision reversing that case * * * emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury. * * *"

This holding that the Constitution requires a jury trial is fully applicable here. A jury cannot be denied merely because the counterclaim is in the same proceedings with other issues in which no jury is provided. And since a referee cannot conduct a trial by jury, the trustee can bring an ordinary plenary action to seek whatever money damages he may be entitled to.

As Judge Phillips said, the court below has forced a choice on a claimant. He can forego his rightful claim to part of the bankrupt estate; or, he can give up his constitutional right to a jury trial on a counterclaim. Such a condi-

tion to a constitutional right cannot be imposed. See *Schneider v. Rusk*, 377 U.S. 163.

Under Amendment VII, the denial of a trial by jury by the court below was in error.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A

STATUTES

Section 2(a) (7) of the Bankruptcy Act, 11 U.S.C. 11(a) (7):

The courts of the United States * * * are hereby invested * * * with such jurisdiction * * * to * * *

"Cause the estate of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction."

Section 60(b) of the Bankruptcy Act, 11 U.S.C. 96(b):

"Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or

converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: Provided, however, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

SUBJECT INDEX

TABLE OF CASES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 28

LOUIS KATCHEN, Petitioner,

vs.

HYMAN D. LANDY, Trustee in Bankruptcy, Respondent.

In the Matter of
KATCHEN'S BONUS CORNER, INC., Bankrupt.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE:

Factual questions are substantially uncontroverted for purpose of the present proceeding, which involves essentially a legal problem relating to the summary jurisdiction in bankruptcy, and a constitutional question as to the function of and right to jury trial as related thereto.

Bankrupt corporation began business in April, 1960, with the Petitioner as a vice president, director, and stock-

holder, his two sons and a third person being the other stockholders and directors. Stock subscriptions were entered by Petitioner and others, but the subscriptions were not paid.

In April, 1960, bankrupt borrowed $40,000.00 from American National Bank, and gave a note for that amount, upon which Petitioner asserts he was an accommodation maker. In June, 1960, bankrupt borrowed $10,000.00 from North Denver Bank, which note bore the typescript name of the bankrupt and the signature of the Petitioner and two other stockholders without further designation or description. Petitioner claims he is neither an accommodation maker not personally liable on the latter $10,000.00 note. Referee and Trial Court found otherwise.

In August, 1960, bankrupt sustained a fire loss. Thereafter collections of the bankrupt were placed in a so-called trust account under the sole control of the Petitioner, who from that account paid on October 13, 1960, $14,599.00 and on November 18, 1960, $10,137.50 on the $40,000.00 note to American National Bank. It is admitted by the Petitioner that those payments reduced his personal liability, and that he knew such was the case when he made the payments.

In September, 1960, Petitioner paid $10,162.50 to the North Denver Bank on the $10,000.00 note mentioned.

Petitioner filed in the bankruptcy proceedings two claims, one for $4,625.00 for unpaid rent on premises he owned and which were occupied by the bankrupt, and one for $5,000.00 representing payment from personal funds of Petitioner to the American National Bank on the note above described.

The Trustee asserted, in the nature of counterclaims to the claims filed by the Petitioner, three counterclaims for the recovery of preferences predicated upon the three payments to the banks upon the loans mentioned above, and an additional counterclaim predicated upon failure to make payment upon the stock subscription mentioned above.

The Referee found that payment of the corporate funds from the trust account on the several bank notes constituted preferences received by the Petitioners, and it was ordered that these be repaid. The Referee further ordered payment of $10,000.00 as unpaid stock subscription.

The District Court sustained the Referee.

The Circuit Court sustained the judgment below as to the three preferential counterclaims, and reversed as to the $10,000.00 stock subscription, holding that the latter claim does not appear to arise out of the same transaction on which the claim is based.

The Trial Court acted substantially on the authority of *Inter-State National Bank of Kansas City vs. Luther, Trustee,* 221 F.2d 382, cert. granted 350 U. S. 810, cert. dismissed by stipulation of parties, id., 944.

The Circuit Court, sitting en banc, divided upon the question of the allowance, in summary proceedings, of the three preference counterclaims.

Petitioner claims that the Referee in Bankruptcy is without power, a claim having been voluntarily filed by the Petitioner, to exercise summary jurisdiction over counterclaims arising out of the same transaction, where

the claimant objects to summary jurisdiction, and appears to contend that such counterclaims must be separately adjudicated in a plenary action instituted by the Trustee.

Petitioner asserts that the Act of Congress does not grant authority to exercise the summary jurisdiction over such counterclaims, and that the Seventh Amendment, relating to trial by jury, precludes such jurisdiction.

Only these jurisdictional, procedural, and constitutional questions, are here presented to the Court. No substantive question as to liability upon the several claims is before this Court.

SUMMARY OF ARGUMENT:

1. Whatever may have been the law prior to the anouncement by this Court of its decision in *Alexander vs. Hillman*, 296 U.S. 222, 56 S.Ct. 204, 80 L.Ed. 192 (1935), it was held in that case that a claimant who filed claims with an equity receiver, but who had not been served with process, nonetheless subjected himself to the jurisdiction of the district court in which receivership is pending for purposes of counterclaims based on alleged misappropriations, since the subject matter of the counterclaims, being cognizable in equity, the district court might grant full relief.

2. Jurisdiction in bankruptcy involves equitable jurisdiction, and those doctrines relating to preferential treatment as among creditors are essentially equitable doctrines, and derive as well from the essential statutory powers of bankruptcy courts in distribution among creditors, in which process a single adjudicatory authority, the

Referee, must be able to make a full determination of rights and liabilities within the over-all canopy of the Bankruptcy Act, applying each of its standards, including the requirements of and with the processes provided by 57(g).

3. Accordingly, since announcement of *Hillman*, its reasoning has been broadly applied in bankruptcy, to the end that it has been held by a majority of the Circuits that an unsecured creditor who files proof of claim submits himself to the jurisdiction of the bankruptcy court for the purposes of a counterclaim arising out of matters arising between the claimant and the bankrupt and asserted by the receiver or trustee.

4. Some division of authority has appeared with reference to counterclaims which do not arise out of the same transaction upon which the claim is based. Since, however, the three allowed counterclaims do unquestionably arise out of the same transaction, this proceeding does not directly involve that distinction or question.

5. Bankruptcy authorities generally have approved the indicated development of the law upon the bases that (a) "equity once invoked will achieve complete relief", and further (b) that "sound construction of the Bankruptcy Act warrants complete adjudication". If, indeed, complete adjudication cannot be had upon a claim by the Referee as the authority charged with the duty to adjudicate the claim, then bankruptcy jurisdiction and the important functions purposed to be achieved thereby are materially prejudiced.

6. Adjudication of counterclaims derivative from the subject matter of a claim filed before the Referee in no

manner interferes with the Seventh Amendment guaranty of jury trial. The Amendment provides that "*in suits at common law,* where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Bankruptcy jurisdiction is *not common law jurisdiction,* and claims filed in bankruptcy are not suits at common law.

7. The power to legislate on the subject of bankruptcies is expressly conferred upon Congress by the Constitution, Article I, Section 8, Clause 4, providing that Congress shall have the power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." It is deemed that the language was used advisedly, and conferred upon Congress the power to legislate on the whole "subject of bankruptcies", embracing all phases of the relationship between a debtor financially embarrassed and all his creditors.

8. Bankruptcy is not in the category of "suits at common law". In essence, bankruptcy law is inconsistent with the settled principles of common law permitting the creditor first seizing assets by execution or attachment to realize over others. Proceedings in bankruptcy are generally conducted in accordance with equitable principles. Bankrupty jurisdiction, however, is not even solely equity, but is at base a distinct and specialized branch of law, jurisdiction, and jurisprudence, to which the Amendment Seven guarantee, in terms applicable only to "suits at common law", does not apply.

ARGUMENT

A. SINCE ALEXANDER VS. HILLMAN, IT HAS GENERALLY BEEN HELD THAT SINCE COUNTERCLAIMS, LIKE CLAIMS, ARE COGNIZABLE IN EQUITY, THE BANKRUPTCY COURT MAY GRANT AFFIRMATIVE RELIEF UPON A COUNTERCLAIM ASSERTED RESPONSIVE TO A CLAIM IN BANKRUPTCY VOLUNTARILY FILED.

Some discussion is devoted in the Brief of the Appellants to the case of *Alexander vs. Hillman*, (1935), 296 U.S. 222, 56 S.Ct. 204, 80 L.Ed. 192. The view is expressed in that Brief that the doctrine of the case is one primarily relating to venue, and is of minimal significance with relation to the substantive problem involved at bar. It is submitted, however, that the doctrines of Alexander vs. Hillman are basic to consideration of the questions here presented.

Prior to that case, there existed some law to the effect that, though a bankruptcy court could consider defenses to claims filed against the estate of the bankrupt, and indeed was authorized and had jurisdiction to set off any claims of the bankrupt estate against the claimant, up to the total amount of the claims filed against the estate by that claimant, the Bankruptcy court was without jurisdiction to render an affirmative judgment against the claimant, unless the claimant consented to jurisdiction.

Among the cases which are sometimes cited to that effect are *Bardes vs. First National Bank of Howarden*, 1900, 178 U.S. 524, 20 S.Ct. 1000, 44 L.Ed. 1175; *In Re Carl Dernburg & Son, Inc.*, (CCA2d, 1924) 5 F.2d 37;

Fitch vs. Richardson, (CCA1st, 1906) 147 Fed. 197; and *In Re Patterson-MacDonald Shipbuilding Co.*, (D.C., W. D. Wash., 1922), 284 Fed. 281. Indeed, *Bardes vs. Howarden* is cited in this context in the Brief of the Appellant, as controlling in the action at bar.

Alexander vs. Hillman permits of no such interpretation. The case did not directly involve bankruptcy. In it, however, the Supreme Court held that the former officers of a corporation in receivership, which former officers had filed claims with the equity receiver, but who had not been in any manner served with process in the receivership proceding, by the filing of those claims subjected themselves to the jurisdiction of the district court for the purpose of the adjudication and determination and entry of judgment upon counterclaims based on their, the claimant officers', alleged misappropriations from the corporation in receivership. This Court specifically noted that since the subject matter of the counterclaims, like that of the claims themselves, was cognizable in equity, the District Court had jurisdiction to grant affirmative relief.

In *Alexander vs. Hillman*, it was asserted by the Claimant officers first that a statute providing that no civil suit be brought in any District Court against any person by any original process in any district other than the district whereof the person so sued is an inhabitant does not affect the general jurisdiction of the District Courts, but merely confers a personal privilege which may be waived, and that a nonresident who presented a claim in the receivership proceeding against the receiver did so waive the privilege and subjected themselves to all the consequences attaching to a general appearance.

The claimants then asserted the provisions of Equity Rule 30, to the effect that they had by their filing of claims commenced suit, so that the defendant (i.e., the receivers) must by their answer set out their defenses to each claim in the bill, and the answer must state any counterclaim arising out of the transaction which is the subject matter of the suit, and might set up any set-off or counterclaim which might be the subject-matter of independent suit. The Court held that this did not preclude the presentation of the counterclaims by ancillary bill; that "The rule does not purport to cover, and was not prescribed for, situations such as that here presented."

Nearly an identical kind of reasoning inheres in the Appellants' assertion in the Brief that "no Act of Congress grants to a Referee in bankruptcy the power to exercise summary jurisdiction over a counterclaim by the Trustee against a Claimant where the Claimant objects to summary jurisdiction."

Appellant cites, and prints in his Appendix A, Section 2(a)(7) of the Bankruptcy Act, 11, U.S.C. 11(a)(7). That section is a very broad grant of power, whereunder "the Courts of the United States * * * are hereby invested * * * with such jurisdiction * * * to cause the estate of bankrupt to be collected, reduced to money, and distributed, *and determine controversies in relation thereto,* except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; * * * ".

By that section, it is further provided that "where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction."

From this, Appellant argues that in a case where the jurisdiction is *affirmatively sought* by the claimant, as by Appellant at bar, the person so seeking jurisdiction may interpose objection, not to the jurisdiction he has sought, but precluding jurisdiction to render judgment against him. This is a highly strained interpretation. Jurisdiction of the District Court in bankruptcy extends to "determining controversies" in relation to the bankruptcy. Bankruptcies, like coins, possess an obverse and reverse. They are not "determined" by examination of one side only. To "determine" a controversy means finally to adjudicate upon and place a termination or end to it. If one is ordered in by summary process to a bankruptcy court, one may interpose timely objection to jurisdiction. If one voluntarily comes in and seeks jurisdiction, one cannot then say, having sought it, that he interposes objection to the pendular swing against him.

In rejecting the arguments made by the Claimants with reference to Equity Rule 30, this Court said:

"But the omission so to extend the rule gives rise to no implication that receivers may not assert and enforce, against those who appear and demand part of the res,

counterclaims for portions of the receivership estate that they wrongfully took and still withhold. The right of the receivers to have affirmative relief in the receivership court is supported by the same, or at least similar and equally strong, reasons as those that constitute the foundation of the rule." [240]

Where the statute confers explicit jurisdiction to "determine controversies in relation" to the estate of the bankrupt; where the summary jurisdiction is expressly conferred "where an adverse party does not interpose objection" in the manner prescribed; and where the jurisdiction is sought, as here, not by the trustee asserting a claim, but by the Claimant voluntarily coming in, then certainly there is not the least implication that the subordinate clause in any manner militates against or derogates from the ordinary rule that assertion of a claim necessarily presupposes jurisdiction to determine and fully adjudicate counterclaims connected therewith and arising therefrom.

Any other result leads to a palpable absurdity, and to a traduction of the essential purpose of the Bankruptcy Act, making quite germane the substantive comment of this Court in *Alexander vs. Hillman* [241]:

"Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. That requirement is in

harmony with the rule generally followed by courts of equity that, having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief. [Citing authorities]. Distribution may not be made without decision upon the counterclaims. Nothing is more clearly a part of the subject-matter of the main suit than recovery of all that to the res belongs. [Citing authorities]."

While *Alexander vs. Hillman* did not upon its face relate to a bankruptcy proceeding—albeit a receivership matter bears a close cognacy—the reasoning of Hillman was thereafter applied to Bankruptcy cases.

Hillman originally came up from, and reverses a contrary decision of, the Fourth Circuit, which, appropriately, was the first of the Circuits to recognize the applicability of the rule to Bankruptcy, and to apply it, doing so in *Florance vs. Kresge* (CCA 4th, 1938) 93 F.2d 784. It was there held that an unsecured creditor who had filed a claim submitted himself thereby to the jurisdiction of the bankruptcy court for the purposes of a counterclaim arising out of a contract between claimant and the bankrupt, and asserted by the receiver and trustee. The statement of the Rule is clear and precise [786]:

"We agree with the learned District Judge that the court below had jurisdiction to adjudicate the rights of the parties with respect to the claims asserted by the receivers and trustee against Kresge. The latter had made himself a party to the cause, both by filing an unsecured claim with the referee and by filing an intervening petition with the court asking that moneys in the hands of the receivers be turned over to him.

Both claims related to his contract with bankrupt for the subletting of the property; and the claims asserted by the trustee and receivers were counterclaims arising out of the same contract. We see no reason why the court of bankruptcy should not pass upon the claims in favor of the bankrupt estate and set them off against the claims filed against the estate and its receivers; and, under the recent decision of the Supreme Court in Alexander vs. Hillman * * *, we see no reason why the court, *which is a court of equity even though exercising special statutory powers,* (emphasis supplied), should not proceed to render judgment against Kresge for any balance found to be due by him. In the case cited, the Supreme Court reversed a decision of this Court which denied the jurisdiction of a court of equity to grant affirmative relief on a counterclaim against a claimant who had filed a claim with the equity receivers, saying:

" 'Respondents appropriately presented their claims and became entitled to adjudication without petition for intervention, any formal pleading, or commencement of suit. Unquestionably, they submitted themselves to the court's jurisdiction in respect of all defenses that might be made by the receivers and of all objections that other claimants might interpose to the validity, amounts, or priorities of their claims. And they put themselves in position, should their interests warrant, to challenge the receivers' acts and the demands of others claiming as creditors. * * * The Circuit Court of Appeals rightly held that the District Court has jurisdiction to pass on all defenses against respondents' claims, but erred in holding it to be without jurisdiction to grant affirmative relief.' "

The argument of Petitioner with relation to the absence of an Act of Congress conferring jurisdiction simply overlooks the essence of filing of a claim. By that act, which is entirely volitional on the part of the Claimant, and optional with him alone, the claimant, as stated in *Florance vs. Kresge*, "had made himself a *party* to the cause". As this Court said in *Hillman*, by so doing, filing claim, the claimants "put themselves in position, should their interests warrant, to challenge the receivers' acts and the demands of others claiming as creditors." While it is perfectly true that a person brought involuntarily into the summary orbit of bankruptcy jurisdiction, by the act of another, as by the petition of the Trustee and the like, may not be required to remain therein, but may elect to have trial in a plenary proceeding, Claimants in bankruptcy, who appear by their own volitional act, cannot thereafter disclaim as to the jurisdiction against them, for by filing claim they become *parties*, a status having dual result, benefit and responsibility.

This Court in *Hillman* specifically reversed the Fourth Circuit because the Circuit had held that affirmative relief could not be granted on the counterclaim. This Court held that the Fourth Circuit "erred in holding it to be without jurisdiction to grant affirmative relief" upon the counterclaim. That is the very essence of the pending litigation. It is the essence of *Hillman* and all that follows it.

B. SINCE THE ANNOUNCEMENT OF HILLMAN, JURISDICTION IN BANKRUPTCY INVOLVING EQUITABLE JURISDICTION, THE REASONING OF HILLMAN HAS BEEN BROADLY APPLIED IN THE CIRCUITS TO THE EFFECT THAT AFFIRMATIVE RELIEF MAY BE GRANTED UPON COUNTERCLAIM ASSERTED AGAINST A CLAIMANT WHO SUBMITS HIMSELF TO JURISDICTION OF THE BANKRUPTCY COURT BY THE ACT OF FILING A CLAIM.

The basic rule having been announced in *Hillman*, and applied, as indicated above, in *Florance vs. Kresge*, to bankruptcy proceedings, the Circuits have rather broadly held, following the reasoning of *Hillman*, that an unsecured creditor who files proof of claim submits himself to the jurisdiction of the bankruptcy court for the purpose of a counterclaim arising out of matters arising between the claimant and the bankrupt and asserted by the receiver or trustee.

Those Circuits so holding have applied the rule in cases, and under circumstances, as follow:

1. IN THE FOURTH CIRCUIT:

The rule in *Hillman* arose out of review of a decision of the Fourth Circuit, and the application of the *Hillman* principle in bankruptcy cases was first made by that Circuit in *Florance vs. Kresge, supra.* Since that time, the rule has been perhaps more extensively discussed in the Fourth Circuit than elsewhere, though the Rule is followed by cases, discussed below, in the Second, Third,

Eighth, Ninth, and Tenth Circuits as well, a majority of the Circuits presently adhering to it.

Columbia Foundry Company vs. Lochner, Trustee (CCA 4, 1950) 179 F.2d 630, 14 ALR 2d 1349, involved the filing, in a bankruptcy proceeding, of a claim for the purchase price of certain cast iron castings sold the bankrupt. Claim was filed by mail by a nonresident creditor, who executed to local attorneys power of attorney to vote at creditor's meetings. Trustee excepted to the claim on the ground of defectiveness of the castings, and also asserted a very large counterclaim for damages allegedly resulting from the use of the defective castings in the business of the bankrupt and, as contended by the Trustee, actually resulting in the bankruptcy itself.

Claimant sought dismissal of the counterclaim, insofar as it exceeded the claim in bankruptcy filed by the Claimant on the ground that the Bankruptcy Court lacked jurisdiction both of the Claimant and the subject matter of the counterclaim. Order of the Referee, affirmed by the District Court, denied dismissal, and the Fourth Circuit sustained that position.

In doing so, the Fourth Circuit limited its discussion to counterclaims relating to the same subject matter as the claim itself, and held, with relation to that class and kind of counterclaim, that the bankruptcy court had jurisdiction to enter affirmative judgment for the trustee on the counterclaim, notwithstanding a provision in the Bankruptcy Act which required action by the Trustee to be brought in the district of which the defendant is an inhabitant.

In deciding that the Claimant voluntarily filing in

Bankruptcy voluntarily made himself a *party* for all purposes to the bankruptcy proceeding, the Court referred, as in *Florance vs. Kresge, supra,* to *Hillman,* quoting the same portions thereof set forth in the quotation from *Florance vs. Kresge* above, and further quotes *Hillman:*

> "The rule contained in Section 41, Judicial Code, 28 USC, #112 [28 USCA #112], that is invoked by respondents here declare: 'No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district that that whereof he is an inhabitant.' The section applies only where a suit is 'brought . . . by any original process or proceeding.' No attempt was made to summon respondents into court. That provision does not affect the general jurisdiction of the District Courts, but merely confers a personal privilege that may be waived . . . [Citations] . . . By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance, section 51 to the contrary nowwithstanding . . . [Citations] . . . "

The Fourth Circuit referred to its own opinion in *Florance vs. Kresge, supra,* and cited, as approving that position in respect to the filing of proofs of claim in bankruptcy as consent to the jurisdiction of the court, *Collier on Bankruptcy,* 14th Ed., Vol. 4, Sec. 6820, pp. 788-790, language which we will cite below, and which, it is to be noted, was cited in the decision of the Tenth Circuit, sought to be reviewed herein, and quoted *in extenso* by Chief Judge Murrah in his Opinion [Record, pages 10 and 11, Note 1].

It is obviously an essential of bankruptcy administration that, insofar as jurisdictionally possible, the affairs

of the bankrupt be, by one tribunal, administered and fully adjudicated, in an orderly fashion. The decision in *Lochner* so recognizes:

> "A case of this sort demonstrates the wisdom of the rule laid down in Florance vs. Kresge, supra, and the improbability that Congress intended to restrict the use of counterclaims to defensive purposes only. Here the trustee is called upon to pay for goods sold to the bankrupt which, for the purposes of the argument, must be assumed to have been so defective as to cause the bankrupt a loss greatly in excess of the purchase price of the merchandise. The counterclaim relates to the very subject matter of the claim itself. It is conceded that the trustee may prove the counterclaim so as to defeat the claim and it follows that the creditor must produce the same evidence to save his claim as he would to defeat an affirmative judgment against him on the counterclaim. The inconvenience and expense of transporting witnesses and records from the claimant's home office to the bankruptcy court, which is stressed by the appellant, would be the same in either event; and the difficulty is unavoidable since it is essential that claims against an insolvent in bankruptcy as in an equity receivership must be handled by the court in charge of the debtor's estate. • • • "

Each of the contentions of the Petitioner here as to the meaning of the Bankruptcy Act, and his assertion that there is no act of Congress allowing affirmative relief in the assertion of a counterclaim, is rather strongly and clearly answered by the Fourth Circuit as placing too strong an emphasis between the venue provisions [at bar the subsidiary clause of the statute on election for plenary hearing] and the basic right of the Trustee to avail him-

self of set-offs and counterclaims *where the creditor presents the claim against the estate and is the moving party, invoking jurisdiction:*

"It seems clear that in adjusting the apparent conflict between Section 23, 11 USCA #46, and Section 68, 11 USCA #108, of the Bankruptcy Act, too much emphasis has heretofore been placed upon the requirements of Section 23 that suits by the trustee shall be brought only where the bankrupt might have brought them if bankruptcy had not occurred, that is, in the district whereof the defendant is an inhabitant, and too little weight has been given to the right of the trustee under Section 68 to avail himself of set-offs and counterclaims, where a creditor presents a claim against the estate. The purpose of Section 23 to protect a defendant from the expense and inconvenience of defending a suit by the trustee away from his home is clear, and this purpose can be served by compelling a trustee who desires to sue to bring the action in the defendant's district. In this way Section 23 can be given adequate scope, since it applies only when the trustee brings suit; and there is no good reason to extend it to the situation where the Trustee himself is sued in effect in the bankruptcy court by a creditor who files a claim against the estate. Then Section 68, entitled 'Set-offs and counterclaims' comes into play, and it is required that an account of mutual debts or mutual credits between the estate and the creditor shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid. There is nought in the text of the section which manifests an intention to subject the trustee to any restriction in the use of a set off that would not

have applied to the bankrupt if sued before his adjudication; and since in such an event the bankrupt could have had an affirmative judgment against his adversary under the ordinary rules of procedure, the trustee should be entitled to the same advantage in winding up the estate. The creditor would not be injured thereby, since the burden of opposing the counterclaim is the same whether it is used as an offensive or defensive weapon, and both parties are advantaged by disposing of both claims in a single suit."

As the Court points out, it stated the objections to this point of view as strongly as possible in its own decision reversed by *Hillman*, and reversed, because as said by this Court, "It is clear that, under the circumstances disclosed, the restrictions laid by the Circuit Court of Appeals upon the receivership court are not consistent with that freedom as to procedure that necessarily belongs to courts of equity administering receiverships."

Of importance, also, is the discussion by the Court of the question of the "right" to a jury in proceedings such as the involved counterclaims in these actions, and its holding that the jury is not, in such circumstances, a matter of right, which discussion, however, is set forth below.

Continental Casualty Company vs. White, Trustee (CCA 4th, 1959) 269 F.2d 213, involved the bankruptcy of a contractor. Contractor's surety filed a claim, and the trustee interposed a cross-claim. Referee refused a motion of the surety to dismiss the cross-claim, and was sustained by the District Court. Sustaining Referee and District Court, the Fourth Circuit held that where the contractor,

being in financial stringency, executed a trust instrument assigning all monies to become due to him on construction contracts to the trustee for the benefit of the surety, the surety agreeing to provide funds for the contractor to complete work on the contracts, and where the sums received by the contractor under the indenture were so closely related to the funds expended by the contractor under the terms of the same instrument as to be inseparable, then the claim of the surety in bankruptcy for the funds provided, and the cross-claim of the Trustee in bankruptcy against the surety, on the theory of voidable preference, for funds paid by the contractor to the surety, arose out of the same transaction. Accordingly, since the matters did arise out of the same transaction, the Circuit Court held that the surety by the filing of its claim submitted itself to the summary jurisdiction of the bankruptcy court in relation to the trustee's counterclaim, which should not be dismissed.

The situation factually is very much that at bar. Discussing its own *Kresge and Lochner* decisions above, the Court states that "the law is well settled in this Circuit that a creditor who voluntarily files a claim in bankruptcy submits to the summary jurisdiction of the court in respect to a counterclaim asserted by the trustee which arises out of the same transaction as the claim itself, and the court of bankruptcy has power not only to adjudicate the counterclaim but also to enter an affirmative judgment against the creditor."

Discussing the substance of the claims, the Court arrives at the conclusion that the claims do arise out of the same transaction, and that, "concluding, as we do, that the claim and the counterclaim in this case arise out of

the same transaction, we need not decide whether the bankruptcy court would have summary jurisdiction to adjudicate a cross-claim coming out of a transaction unrelated to that upon which the creditor's claim is based." Of course, it is admitted in the case at bar that Petitioner's Claims and the allowed Counterclaims do arise out of the same transactions, since the Claims involve payments on loans, and the preference counterclaims involve payments on the same loans, relieving the personal liability thereon of the Petitioner. For this reason, and as stated above, we do not discuss here, either, the problem of the counterclaim substantively unrelated to the Creditor's claims upon which jurisdiction is predicated, and where no such relation existed, the Tenth Circuit, in the decision here sought to be reviewed, in fact disallowed jurisdiction of the bankruptcy court.

It is of importance to note that the surety contended *Lochner and Kresge* decisions to have been superseded by a 1952 amendment to the Bankruptcy Act, being the section on timely interposition of objection, quoted and referred above, that is, Section 2., sub. a(7), 11 USCA #11, sub. a(7).

As we have discussed academically above, that Amendment was neither purposed nor effective to permit a claimant to file a claim, and file an objection when counterclaim was asserted against him, he having first and of his own volition invoked the summary jurisdiction in bankruptcy [215-216]:

" • • • [statute quoted] For a proper interpretation of this statute it is necessary to consider its history. In Cline vs. Kaplan, 1944, 323 U.S. 97, 65 S.Ct. 155, 89 L.Ed. 97, the Trustee in Bankruptcy petitioned the

Referee to order the respondents to turn over certain assets allegedly belonging to the bankrupt. The respondents contested the order, claiming ownership in themselves, and near the close of the hearing moved that the trustee's petition be dismissed for want of summary jurisdiction in the bankruptcy court. The Supreme Court held that the turnover order could be resisted as the respondents had not consented to the summary jurisdiction of the Court.

"The section quoted above was enacted to clarify and limit the effect of the Cline case. House Rep. No. 2320 and Senate Rep. No. 2234, 82nd Cong., 2nd Sess. We are of the opinion that this amendment was intended by Congress to apply to situations similar to Cline vs. Kaplan, *where the adverse party is involuntarily brought into court by peremptory process* [Emphasis Supplied], such as a turnover order, and was not meant to diminish the jurisdiction of the bankruptcy court where the creditor has come into court voluntarily by the filing of a claim against the estate. Interstate National Bank of Kansas City vs. Luther, 10 Cir., 1955, 221 F.2d 382, 388. *There is nothing to indicate that the statute was designed to authorize a party to object to the summary jurisdiction where he has come into court on his own motion seeking relief.*" [Emphasis Supplied].

Nortex Trading Corp. vs. Newfield, Trustee (CCA 4th, 1962) 311 F.2d 163 involved a claim by Nortex, and a counterclaim filed by the Trustee, and contained in a pleading served upon the counsel for the Claimant. Certain problems as to service were discussed, including a holding that service of a pleading containing the counterclaim may

be made upon claimant's attorney ,and need not be personally served upon the claimant. Insofar as pertinent to the discussions at bar, the case restates the Rule announced above [164]:

> "The filing by Nortex of its proof of claim is analogous to the commencement of an action within the bankruptcy proceeding. * * * The trustee's petition is in the nature of an answer incorporating an affirmative re-question for relief by way of surrender of the preference. It has often been recognized that counterclaims by the trustee against a claimant are within the summary jurisdiction of the bankruptcy court . . . [Citations] . . . The claimant is deemed to consent to the jurisdiction of the court upon filing its proof of claim. * * * "

2. IN THE SECOND CIRCUIT.

The Second Circuit early recognized the basic and general applicability of the doctrine of this Court in *Hillman,* and discussed the problem in *Chase Nat. Bank of City of New York vs. Lyfrod* (CCA 2nd, 1945) 147 F.2d 273, a Bankruptcy proceeding involving the reorganization of a railroad. It was held that in such a proceeding, a claimant bank which had set off the debtor's account in the bank against the indebtedness and filled in the reorganization proceeding a claim for the balance could not object to summary proceedings, since the presentation of the claim presented to the bankruptcy court the question of the propriety of the bank's action in setting off the account balances against the claim. Judge Frank, for the Circuit, quoted the Supreme Court's statement in *Hillman* that "By presenting their claims respondents subjected

themselves to all the consequences that attach to an appearance, section 51 to the contrary notwithstanding.'

Applying that rule in reference to a claim in bankruptcy, he stated further [277]: "We think that the doctrine of that case is not limited to a case where claims are filed by wrongdoing officers and directors (or the like). And we see no reason why the doctrine is not applicable to proceedings under section 77, no reason why the venue provisions of section 23 were not waived when the bank filed its claim against the debtor here."

Further, said the Court, "here the very claim of the bank, since it disclosed the application of the balance and was for the net amount remaining after such application, presented to the court the issue of the validity of the bank's conduct in applying the balance," as, indeed, the claims of the Petitioner, liable upon the notes, in applying the trust or sequestered funds in his hands and sole control to the liquidation of debts upon which he has a liability, and with respect to payments on which he makes a claim, clearly must submit the question of propriety of the use of the sequestered funds, so far as the rules of preference are concerned.

In *Conway et al. vs. Union Bank of Switzerland et al.*, (CCA 2nd, 1953) 204 F.2d 603, certain Swiss banks filed a bankruptcy claim, but did not properly proceed to perfect it. An order had entered which required doing of certain acts by the claimant by a certain date, or that they be barred from the distribution of assets. It was held by the Circuit that such an order, not complied with, did not amount only to a grant of leave to withdraw with reservation in the trustees of the right to file a counterclaim, but

finally terminated the claims of the bank as much as would have been done had their claim been dismissed, so that the court had no jurisdiction over the banks thereafter, and accordingly none over counterclaims asserted against them.

However, the *Hillman Rule* was very specifically recognized and concurred in, and it was held that the banks which had made a claim had thereby made themselves parties to the Bankruptcy proceedings, that by so claiming, the creditor was exposed to every defense that the insolvent might have to the claim, including set-offs or counterclaims, and that it is immaterial whether the creditor's claim is valid, the only relative inquiry being whether or not he is a claimant when the counterclaim is filed.

It was held in that regard that the banks were not claimants when the counterclaims were filed because for all effective purposes their claims had been dismissed and they were no longer before the bankruptcy court, although they had once been so. Judge Learned Hand for the Circuit stated the matter as follows [606-607]:

> "We agree with the Trustee that 'The Banks' had made themselves parties to the reorganization proceeding. Indeed, we cannot see what more was necessary than the claim they had made in 1946 to the dividend of ten per cent, and the receipt of $64,000 by the Central Bank. There can be no more definitive act making one a party to a proceeding to distribute the assets of an insolvent among its creditors, than to claim and actually to receive one's proportional share in a distribution of its assets. That is precisely the

purpose of such a proceeding and all that any creditor can get out of it. * * *

"As we have already said, the only interest of a creditor or shareholder in an insolvency proceeding is to recover his share of the assets, but by intervening he naturally exposes himself to every defense that the insolvent may have to his claim, including set-offs or counterclaims; however uncertain it was before the Supreme Court so held in 1935 whether he also exposed himself, not only to an extinction of his claim, but also to affirmative recovery under a counterclaim.[5] [5. Alexander vs. Hillman, 296 U.S. 222, 56 S.Ct. 204, 80 L.Ed. 192]. That case did so decide, and we assume therefor that the notices served under the Trustee's Petition of December 27, 1951 would have been an equivalent of personal serve upon 'The Banks,' if at that time they had been claimants, as creditors of the Debtor; but we think that they had ceased to be such claimants before the Trustee's petition of December 27, 1951, was filed, and that it was no longer possible to obtain jurisdiction *in personam* over them. * * * "

Again, there seems to be unequivocal acquiescence by the Second Circuit in the interpretation of *Hillman* as holding that a claimant in a bankruptcy proceeding exposes himself to counterclaims not only extinguishing his claim, but to affirmative recovery under the counterclaim.

3. IN THE THIRD CIRCUIT.

In *Re Solar Manufacturing Corporation,* (CCA 3rd, 1952) 200 F.2d 327 involved the filing by indenture trustees of claims in bankruptcy under agreement with the debtor. Counterclaims were filed by the Trustees in Bankruptcy

against the claimant, which moved to dismiss on jurisdictional grounds. The Third Circuit held that the District Court, as the bankruptcy court, had summary jurisdiction over such counterclaims.

The Court carefully discussed all of the decisions mentioned herein and made to the date of its own decision, and concluded that while prior to *Hillman* it had been held that a bankruptcy court could consider defenses to claims filed against the bankrupt estate and was empowered to set off claims of the estate against the claimant up to the amount of the claim, after affirmative judgment could be granted on the counterclaims, since in *Hillman* "the court noted that since the subject matter of the counterclaims, like the claims, was cognizable in equity the district court had jurisdiction to grant affirmative relief."

The Court notes that "the reasoning of Hillman was thereafter applied in bankruptcy cases," and in this connection discusses *Florance vs. Kresge and Columbia Foundry vs. Lochner, supra.*

Additionally, the Court, noting that its facts were "quite similar to those before us" discussed *In Re Nathan,* (D.C.S.D. Cal., 1951), 98 F.Supp. 686, and discussed the reasons for allowance of full adjudication and rendition of judgment upon counterclaims, under the sumary jurisdiction [330]:

> " • • • An adjudication of the defenses and set-off to the claim would be res judicata in a plenary suit on the counterclaim. Thus the legal result of allowing a plenary suit on the counterclaim would be the same as if consent to summary jurisdiction had been given. Second: A fundamental purpose of the Bankruptcy

Act is to effect a quick and summary disposal of questions arising in the progress of the case. The court pointed out that those considerations of reason and policy which were strong factors in the Hillman decision were equally applicable in the Nathan Case. It held that implied consent to the jurisdiction of the Bankruptcy Court had been given by the creditor when it filed its claim; that no substantial right of the creditor was therein impinged and that the result would be to effectually speed up the final settlement and distribution of the bankrupt estate in accordance with one of the distinct purposes of the Bankruptcy Act."

The Third Circuit in this opinion, as did the Fourth Circuit in *Florance vs. Kresge,* and Judge Murrah in the Tenth Circuit Opinion in the case at bar, notes the concurrence, as a matter of expedition of the essential bankruptcy jurisdiction, of Collier on Bankruptcy in the view so expressed. [Vol. 4, pp. 788-90].

The Third Circuit therefore concluded that filing of the claim conferred jurisdiction to grant affirmative relief upon counterclaim arising out of the same subject matter, stating [331]:

"In Hillman, Kresge, Lochner and Nathan, as in this appeal, the subject matter of the counterclaim arose out of the same transaction as the claim. This is important because in those circumstances, as we have above indicated, the trustee may have a summary adjudication of the issues upon which his counterclaim depends by raising these issues in his answer to the claim. Appellant offers no reason for compelling the trustee to institute a plenary action in order to obtain

affirmative relief where as here, the issues adjudicated as defenses on the claim would be res judicata in the plenary suit."

4. IN THE EIGHTH CIRCUIT.

Floro Realty & Investment Co. vs. Steem Electric Corporation, et al., (CCA. 8th, 1942) 128 F.2d 338, involved a bankruptcy situation in which the lessor of the bankrupt asserted in the bankruptcy court a claim for the possession of the premises leased to the bankrupt, as a result of which there was asserted a claim against that claimant for the return to the lessee and its successors of a deposit made with the lessor to secure the payment of rent under the lease. It was claimed by the lessor that there was no jurisdiction to decree return of the deposit. The Circuit did not agree, and held [340]:

> "Assuming without holding that the Bankruptcy Court, of its own motion, or on that of an interested party, would have been without jurisdiction in a summary action to order a return of the $3,000 deposit, Floro having submitted to the court its claim for possession of the property involved, brought to the court for determination not only the questions which it deemed germane to its right of possession but also all questions of defense which would be lawfully interposed, and cannot thereafter withdraw, but that court has jurisdiction thereupon to determine all controversies in relation to the claim thus submitted."

In so holding the Court relied upon determinations in the Second Circuit, and upon *Florance vs. Kresge, supra*, which the Eighth Circuit quotes [341] at some length with approval, so referring to and adopting the *Florance vs.*

Kresge interpretation of *Hillman*. While recognizing factual differences in the cases, the Court further quoted the statement from *Case vs. Los Angeles Lumber Co.*, 308 U.S. 106, 126, 127, 60 S.Ct. 1, 12, 84 L.Ed. 110 [341]:

> "And once the jurisdiction of the court has been invoked, whether by the debtor or by a creditor, that petitioner cannot withdraw and oust the court of jurisdiction. He invokes that jurisdiction risking all of the disadvantages which may flow to him as a consequence, as well as gaining all of the benefits."

The Court mentions that there have been other authorities cited to it by the claimant-appellant, "but almost, if not all of them, are cases where the property involved was in the possession of an adverse claimant who was not seeking relief from the bankruptcy court, and had not submitted to the court's jurisdiction, and none in point here."

Moreover, the Court states [341] that objection to the jurisdiction at the time the bankruptcy court is asked to pass on the counterclaim, and after the claimant has itself invoked the jurisdiction by the filing of its claim, comes too late:

> "It is true that when the bankruptcy court was asked to pass upon the question of the return of the $3,000 deposit, Floro objected to the court doing so in a summary action, but that objection came too late, as it had already invoked the jurisdiction of the bankruptcy court and could not then withdraw, and no new consent on its part was necessary."

Precisely the same situation exists at bar. Petitioner sought to recover on claims. When counterclaims were as-

serted, he objected to the exercise of the plenary jurisdiction he had himself invoked and put in motion. "That objection came too late."

5. IN THE NINTH CIRCUIT.

Peters et al. vs. Lines, Trustee, (CCA 9th, 1960), 275 F.2d 919, involved a proceeding on a petition by the trustee in bankruptcy for affirmative relief against creditors based on an alleged breach of contract by those creditors, operating logging mills, and the bankrupt, a supplier of logs. The Ninth Circuit held that where the creditors had filed claims against the brankrupt based on alleged breach of contract by the bankrupt, the bankruptcy court thereby acquired jurisdiction to grant affirmative judgment against the creditors, in summary proceedings based on transactions arising out of the contracts. There arose some questions on the amount of damages, discussed at length in the opinion and not here germane.

Essentially, the Court held that the creditor, by filing proof of claim against the bankrupt, consented to the jurisdiction of the bankruptcy court to render an affirmative judgment against the creditor on trustees counterclaims arising out of the same contract. The Court held against the contention that the plenary suit was the only method of recovery on the counterclaim, since it pointed out that the purpose of a plenary suit in bankruptcy administration is to seek recovery from a person who has not voluntarily submitted himself to the jurisdiction of the bankruptcy court, and that, obviously, if a person, not compelled to come into the bankruptcy court, does so for his own advantage, as in the presentation of a claim, then a plenary suit against him is purposeless, since he has of his own voli-

tion submitted his claims and whatever counterclaims arise therefrom to the summary jurisdiction of the bankruptcy court, has consented to the summary jurisdiction and disposition, and has waived any right to jury trial.

Deciding the case, the Court asked itself the question [923]: "Did the bankrupcty court have summary jurisdiction not only to hear but to grant the trustee's petition for affirmative relief against appellants." It held that that question "must be answered in the affirmative." [924].

In so holding it directly holds against Petitioner's contention that there is no statute granting jurisdiction, citing Section 2, sub. a(7) and Section 68 of the Bankruptcy Act, Title 11 USCA #11, sub a(7) and 108.

The Court points out that there is no clear decision in the Ninth Circuit upon the jurisdictional question, and so discusses, and summarizes rather interestingly, the positions of the several circuits in this regard [924-5]:

> " • • • The other circuits are not entirely in accord on this question, although the apparent conflict can be reconciled. The leading case supporting the summary jurisdiction of the bankruptcy court in such a case as this is Florance vs. Kresge, 4 Cir., 1938, 93 F.2d 784, the principle of which was re-affirmed in Columbia Foundry Co. vs. Lochner, 4 Cir., 1950, 179 F.2d 630, 14 A.L.R.2d 1349, and more recently in Continental Casualty Co. vs. White, 4 Cir., 1959, 269 F.2d 213. The rule in the Fourth Circuit is thus clearly defined that the claimant, by submitting his claim to the trustee in bankruptcy, consents to the summary jurisdiction of the bankruptcy court to administer a counterclaim against the claimant asserted by the trustee *provided* the subject matter of the counter-

claim is the same as that of the original claim. This is also the rule of the Second Circuit, Chase National Bank vs. Lyford, 2 Cr., 1945, 147 F.2d 273; the Third Circuit, In Re Solar Mfg. Corp., 3 Circ., 1952, 200 F.2d 327, certioari denied sub nom. Marine Midland Trust Co. vs. McGirl, 345 U.S. 940, 73 S.Ct. 831, 97 L.E. 1366; The Eighth Circuit, Floro Realty & Investment Co. vs. Steem Electric Corp., 8 Circ., 1942, 128 F.2d 338; and the Tenth Circuit, Interstate National Bank vs. Luther, 10 Cir., 1955, 221 F.2d 382. Thus five circuits are of the view that the filing of a claim is an implied consent to the bankruptcy court's summary jurisdiction of a counterclaim arising from the same transaction as that from which the proof of claim arises.

"In the case of B. F. Avery & Sons vs. Davis, 5 Cir., 1951, 192 F.2d 255, certiorari denied 1952, 342 U.S. 945, 72 S.Ct., 559, 96 L.Ed. 703, the Fifth Circuit held that a claimant did not, merely by filing his proof of claim against a bankrupt estate, submit himself to the summary jurisdiction of the referee to recover a preference against him which did not arise out of the same transaction as that involved in the claim. Hence, the Avery Case is distinguishable on its facts from the line of decisions following the leading case of Florance vs. Kresge, supra, although it is often cited as holding directly contrary to them. To hold that the filing of a proof of claim is to submit to the summary jurisdiction on a counterclaim arising from the same transaction is quite a different matter from holding that submission of a claim is a consent to summary jurisdiction on a counterclaim arising from an entirely separate transaction."

It is abundantly clear, then, as summarized by the Court, that the clear preponderance of decided authority follows the rule of *Florance vs. Kresge* and its interpretation of *Hillman;* that that rule, followed by the Tenth Circuit in the case at bar, is the uniform current of authority, and the established authority in six Circuits; and that the claimed "contrary" authority is in essence not contrary at all, but is predicated upon the distinction between a counterclaim which arises out of the same transaction or circumstance or event as the claim conferring jurisdiction, and a counterclaim which arises out of an entirely different and separate transaction. This distinction is recognized as inhering in the cases claimed by Petitioner to support his position.

At page 9 of the Brief, Petitioner attempts to set forth some such support. He mentions *Avery vs. Davis,* discussed by the Ninth Circuit above, and effectively concedes the distinction, namely that the claims disallowed arose out of different transactions. He mentions the decision of the Seventh Circuit in *In Re Majestic Radio,* (CCA 7th, 1955) 227 F.2d 152. That decision, however, is fully discussed by the Ninth Circuit in *Peters vs. Lines,* [925, note 4], where the Court notes that the distinction between consent to jurisdiction of a counterclaim arising out of the same transaction and to one arising from an entirely separate transaction has been well noted by the 7th Circuit, and quotes from *Majestic Radio, supra,* 156:

> "But no case has been cited, nor have we found any, in which it has been held that a Bankruptcy Court has acquired such jurisdiction of a setoff or counterclaim because the counterdefendant had filed a proof of claim arising out of a completely different subject matter."

Though the Petitioner cites [Brief, page 9], *Continental Casualty vs. White, in Re Solar Manufacturing Corp.*, and *Peters vs. Lines*, all *supra*, not one of those cases holds in his favor, but, as discussed at length, holds diametrically in opposition, in the most explicit terms, to his position, while as pointed out in *Peters vs. Lines*, the two cases which hold differently, *Avery vs. Davis* in the Fifth Circuit and *Majestic Radio*, in the Seventh, are expressly distinguished in the opinions, involving counterclaims arising from transactions different from those giving rise to the claim upon which jurisdiction is predicated.

This distinction is fully recognized by the Tenth Circuit in the opinion at bar, the counterclaims based upon the failure to pay stock subscriptions being disallowed by the Circuit Court. As pointed out in the Opinion below [Record, page 9], this distinction is recognized by the Respondents, and the Tenth Circuit states [Record, page 11]:

> "Upon reconsideration of Inter-State, in the light of subsequent decisions and commentary, we have decided to adhere to its pronouncements. But, we decline to extend the summary jurisdiction of the court by implied consent to counterclaims which do not involve a preference, set-off, voidable lien, or fraudulent transfer, and which are wholly unrelated to the creditor's claim. Claims of this nature are not within the Referee's summary jurisdiction, and a claimant does not consent to the exercise of the bankruptcy court's plenary jurisdiction by filing his claim in bankruptcy." Accordingly, "the judgment of the bankruptcy court is affirmed on all counterclaims except the Trustee's

counterclaim for the purchase price of the subscription stock."

It would then appear, as it is respectfully submitted, that there does not exist in the Circuits authority for the present position of Petitioner; that the counterclaims, being preference claims intimately related to the subject matter of the Petitioner's claim, consent to the summary jurisdiction was given by filing of the claims, and full jurisdiction existed in the Referee and Bankruptcy Court to grant affirmative relief upon those counterclaims allowed.

At Page 11 of the Brief, we submit, Petitioner effectively concedes his case. The rationale of the entire developed line of cases, as summarized above, rests upon the fact that jurisdiction in bankruptcy having attached, it is the fundamental function of and requirement incumbent upon the Referee and Bankruptcy Court to make full and complete disposition of the assets of the bankrupt estate and of the claims against it. *Hillman* states the principle of full determination in equity. *Kresge* and the succeeding line of cases apply the principles to bankruptcy. The Tenth Circuit in *Interstate,* as discussed both above and hereinafter, recognizes the structural integrity of the bankruptcy system as created by the statutes referred above, and specifically including the process granted and duties imposed by 57(g).. Not only, then, is there no absence of statutory authority, but the statutes make it incumbent upon the Referee to adjudicate and finally determine claims, which is possible only if he adjudicates as well related counterclaims which involve preference, set-off, voidable lien, or fraudulent transfer. This is the essence of *Interstate vs. Luther,* and of the majority

opinion below and here sought to be reviewed, and is the quintessence of Bankruptcy jurisdiction, for otherwise the administration in bankruptcy must become mired in a morass of circular litigation.

6. IN THE TENTH CIRCUIT

The Tenth Circuit has, of course, followed the position basically detailed above. That Court first considered the problem in *Inter-State National Bank of Kansas City vs. Luther,* Trustee, (CCA 10th, 1955) 221 F.2d 382, in which certiorari was granted by this Court, but the proceeding later dismissed upon agreement of the parties.

Proceedings were in bankruptcy. A creditor filed proof of claim, and the trustee sought affirmative relief. The referee voided a preference and directed that the trustee recover from the creditor, who appealed. The District Court sustained the Referee, and the Circuit Court sustained the District Court, two judges dissenting.

Essentially the Court held that although a bankruptcy court cannot within the summary jurisdiction adjudicate a controversy respecting property held adversely to the bankrupt estate without consent of the adverse claimant, where a creditor files proof of a claim, and responsively the trustee seeks relief against that creditor, the effect is that of an equitable counterclaim, of which the Court does have jurisdiction, and the 1952 Amendment to the Bankruptcy act was not intended to either extend the summary jurisdiction or to extinguish it once attached, but was purposed to apply only to controversies arising in bankruptcy where the adverse party is brought into court by preemptory process, and not where the claimant himself voluntarily comes into court seeking relief under

the summary jurisdiction. Accordingly, when once the jurisdiction in bankruptcy has been invoked, the person so invoking jurisdiction risks all disadvantages which may flow to him as well as gaining all benefits derivative from invocation of the jurisdiction.

Judge Murrah, who wrote the opinion sought here to be reviewed, also wrote the opinion in *Luther*. He considered all of the cases cited above which had been decided to the time of *Luther*, and considered also and quite fully the line of opinions relied upon by the Petitioner here. The Court considered very fully [388-389] the effects of *Hillman*, and reviewed earlier decisions in other circuits, reviewed *in extenso* above, applying the *Hillman* doctrine to bankruptcy proceedings, concluding [389]:

> "It is only a short, and to us a perfectly valid jurisdictional step from the summary power to adjudicate a voidable preference and summary power to grant affirmative relief thereon, especially when the authorized adjudication has binding effect in a plenary suit. Certainly the exercise of this affirmative equitable jurisdiction is within the substantive provisions of the Bankruptcy Act providing for the disallowance of claims tainted with a preference, i.e. see #57 sub. g. and 60, sub. a., supra."

In Luther, the Court apparently further held that Bankruptcy Act provisions authorizing set-off of all mutual debts and credits between the bankrupt estate and the creditor imported equity set-off into bankruptcy, and so indicated that there might be use of the summary jurisdiction with relation to claims which did not arise out of the same transaction as the claim upon the filing of which consent to jurisdiction is pre-

dicated. No such problem, as a problem of fact, is presented at bar, and, as noted above, the Tenth Circuit in the opinion here under consideration [quoted at page 34 above], has declined to extend the summary jurisdiction of the court by implied consent to counterclaims which do not involve a preference, set-off, voidable lien, or fraudulent transfer, and which are wholly unrelated to the creditor's claim, holding claims of this nature not within the summary jurisdiction, and that a claimant does not consent to the summary jurisdiction over such claims by filing his claim in bankruptcy. As mentioned, this position is agreed to by the Respondent, and the three counterclaims allowed are entirely within the class over which jurisdiction is held to exist.

The further development by the Tenth Circuit has taken place in the opinion in this Case, which is fully printed, both as to the majority, concurring, and dissenting opinions, in the Transcript of Record [pages 8 and following], being reported in 336 F.2d 535.

It is respectfully submitted that the determination of the Tenth Circuit, as announced in the majority opinion below, is entirely consonant with the full range of judicial thinking since *Hillman*, as concerns the bankruptcy jurisdiction, and is predicated specifically upon well considered and thoroughly documented opinions from five other circuits, the full majority of the Circuits adhering to the position expressed below, and, as explained above, contrary opinions in the Fifth and Seventh Circuits being entirely reconcilable upon the predicate of the facts in those cases involving claims not related to or arising out of the same transaction as the claim predicated as the jurisdictional basis.

C. THE LINE OF DECISIONS DEVELOPED AS DETAILED ABOVE IS GENERALLY APPROVED BY COMMENTATORS UPON BANKRUPTCY LAW UPON THE BASES THAT "EQUITY ONCE INVOKED WILL ACHIEVE COMPLETE RELIEF", AND FURTHER THAT SOUND CONSTRUCTION OF THE BANKRUPTCY ACT WARRANTS A COMPLETE ADJUDICATION.

In *Columbia Foundry vs. Lochner, In Re Solar Manufacturing Corporation,* and the Majority Opinion below, reference is made to the adoption of the essential view expressed in the digested cases by the editor of Collier on Bankruptcy [Vol. 4, pp. 788-790], an authority of obviously high reputability in this field of the law.

The quoted work states, as set out in *Lochner, supra,* states:

"It is clear that where the plaintiff's petition is of such a nature that he submits his cause to the bankruptcy court, and manifests a willingness that the court fully determine his rights therein, such as in a reclamation petition, he consents to the court's jurisdiction and cannot complain thereafter of the Court's power to render a judgment against him upon a proper setoff or counterclaim asserted by the trustee. On the other hand, the mere filing of a proof of claim for allowance is not such a clear expression of consent, and that a bankruptcy court may not render an affirmative judgment upon a set-off or counterclaim asserted by the trustee. It was said that a plenary suit was the only remedy, unless the trustee waived all right to the excess. In Florance vs. Kresge,

however, the court held that the filing of an unsecured claim amounted to a submission to the court's jurisdiction so as to permit an affirmative judgment upon a proper counterclaim asserted by the trustee and receivers. In the light of expeditious administration of bankruptcy estate, and an avoidance of multiplicity of litigation, this decision has much to recommend it. It would further serve to reduce the operation of the 'absurdity of making A pay B when B owes A.'

"One who files a proof of claim should be held to acquiesce in the adjudication of any proper set-off or counterclaim even to the extent of a judgment thereon, since as pointed out in the Kresge case, the claimant puts himself in a position, should his interests warrant, to challenge the receiver's or trustee's acts and the demands of others claiming as creditors. He should not be permitted to claim the benefits of such a position, and yet maintain a favored advantage as against the trustee or receiver, compelling that officer to resort to a plenary action to collect on a claim that is a proper subject of set-off or counterclaim."

The majority opinion below also adverts to an article by Professor Moore, editor of Collier, in 68 Yale L.J. 1, 32, quoted in the footnote [Record, pages 10-11 herein] wherein Profesor Moore agrees with the majority in *Interstate* and below upon the basis that under the doctrine of *Hillman*, equity once invoked will grant complete relief, and that, practically, sound construction of the Bankruptcy Act warrants complete adjudication. Indeed, if this is not the case, then Bankruptcy jurisdiction must become utterly chaotic, and the speed and expedition which is its essence as a constructive force must be entirely lost and foregone.

The view which is contended for by the Respondent and expressed above seems to find acceptance so general at present that a subversion of it would be effectively a basic denigration of bankruptcy jurisdiction. Thus, the position finds quite unequivocal statement even in the encyclopedic writings, as for example 9 Am. Jur. 2d 402, Bankruptcy #520, where it is basically stated:

> "A number of decisions recognize jurisdiction in the bankruptcy court, when a counterclaim comes before it in opposition to a claim proved in bankruptcy proceedings, to render affirmative judgment on the counterclaim against the original claimant in such amount as the counterclaim may be established in excess of the established amount of his claim. This view seems to be clearly sound where the counterclaim arises out of the same transaction on which the claim is based and is accordingly in the nature of a defense by way of recoupment, even though the creditor who filed the claim is a nonresident of the district, as, by filing proof of claim, the creditor is deemed to consent to jurisdiction of the bankruptcy court to adjudicate all aspects of any controversy pertaining to it. *The propriety of entering an affirmative judgment against the original claimant in such instances, if the counterclaim is found to be valid in an amount exceeding his allowable claim, is now sustained in at least six circuits.* [Emphasis supplied]. The counterclaim must, however, be one arising out of the same transaction and in the nature of recoupment, or one based on mutual debts or credits and within the orbit of Bankruptcy Act #68, in order to serve as a basis for affirmative judgment by the bankruptcy court against the original claimant, since, with respect to other con-

tested liabilities, he is an adverse claimant entitled to plenary suit and is not deemed to invite or consent to exercise of bankruptcy court jurisdiction by merely filing proof of claim against the estate."

D. NO MERIT INHERES IN THE CONTENTION THAT ADJUDICATION OF COUNTERCLAIMS ARISING FROM THE SUBJECT MATTER OF A CLAIM FILED IN BANKRUPTCY DEPRIVES THE CLAIMANT OF ANY RIGHT UNDER THE SEVENTH AMENDMENT GUARANTY OF JURY TRIAL.

Petitioner contends that, inasmuch as he cannot have a trial by jury upon the counterclaims arising out of and adjudicated in connection with his claims or the subject matter thereof, he is deprived of a right guaranteed him by the Seventh Amendment to the Constitution.

None will detract from the importance of jury trial, but neither should there be interference upon such predicate with jurisdiction never within the contemplation or scope of that guaranty.

The Seventh Amendment simply provides that "*in suits at common law*, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." [Emphasis supplied].

Bankruptcy jurisdiction is *not common law jurisdiction*. Claims filed in bankruptcy and the counterclaims dependent thereon and related to the subject matter thereof are not claims at common law and do not involve in their adjudication suits at common law.

It is to be remembered that the power to legislate on the subject of bankruptcies is expressly conferred upon the Congress of the United States by the Constitution itself, Article I, Section 8, Clause 4, providing that Congress shall have the power "to establish . . . uniform laws on the subject of bankruptcies throughout the United States." Moreover, Congress in this respect has the general power "to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers."

Obviously bankruptcy is an ancient jurisdiction, having been well known to the authors of the Constitution, and deriving in formal form from the first English Bankruptcy Act of 1542, during the reign of Henry VIII, and derivatively from nearly three centuries of English law, itself stemming from Roman commercial precedent. *Continental Illinois Bank & Trust Co. vs. Chicago, R. I., & P. R. Co.*, 294 U.S. 648, 79 L.Ed. 1110, 55 S.Ct. 595.

Though historically connected with the English law, bankruptcy as we know it does not wholly parallel the English theory, which was partially criminal in nature, primarily conceived to deal with fraudulent debtors, and intended to distribute the sought-out properties of such persons among their creditors, while the modern concept of bankruptcy has been extended to relieve the embarrassed and "honest" debtor by discharge, perhaps one of the most important of the bankruptcy functions, to conserve the estate of the debtor in order to maximize and equalize distribution, and even to reorganize the estate in order to preserve the economy from the shock of substantial and total commercial failures.

It is rather obvious that such a jurisdiction is not fundamentally a common law jurisdiction. Indeed, under the classic theory of the common law, "the race is to the swift", and the creditor who first obtains adjudication of his claim and by legal processes seizes an asset is entitled to the benefit thereof, while bankruptcy, quite opposedly, fundamentally seeks a marshalling and a non-preferential distribution.

The jury has always been a bulwark of the common law adjudication of basic and controverted issues of fact. Its utility is recognizedly limited in complex matters of accounting, and inutile to the point of disallowance in general *equity* cognizance.

Because of the broad, broadening, and basic function the bankruptcy jurisdiction plays in American economics, this Court has tended, and the tendency of both legislative and judicial interpretation of the bankruptcy powers has been, uniformly in the direction of a liberalization of the scope of the bankruptcy jurisdiction conferred upon the Congress by the Constitution, and not upon a limitation of that jurisdiction by procedural impediments such as the universal introduction of jury trial. *Continental Illinois*, supra, rather elaborately indicates this tendency, and indicates that the limitations upon the power of the Congress to legislate upon the subject of bankruptcies is an area never explicitly defined, while the full width of boundary of the field has not yet been revealed.

The real scope of the power of the Congress is the "subject of bankruptcies", and, of course, there can be no final definition, since the scope continually changes with the alterations in the economy. *Wright vs. Union Cent. L.*

Ins. Co., 304 U.S. 502, 82 L.Ed. 1490, 58 S.Ct. 1025, rehearing denied 305 U.S. 668, 83 L.Ed. 433, 434, 59 S.Ct. 56. Accordingly, and in the same case, it is stated that the power of the Congress over bankruptcies is certainly not limited to the extent of English bankruptcy jurisdiction at the time of the adoption of the Constitution, while the grant of the power of Congress in this, as in other fields of a living constitution, is not restricted to the grant as utile and understood at the time of adoption of the Constitution under the conditions then existing, but must be interpreted under modern conditions in order to deal adequately with the ever more complex relationships existing between financially embarrassed debtors and their creditors and even the policy itself.

Several of the Circuits, in the decisions adverted to above, have expressly—and negatively—considered the permissible role of the jury in adjudication of counterclaims of the kind here involved.

Thus, *Columbia Foundry Co. vs. Lochner, supra,* specifically holds that bankruptcy courts in dealing with the claims of creditors sit as courts of equity and try such claims without the intervention of a jury, citing in this regard *Pepper vs. Litton,* 308 U.S. 295, 303-311, *In Re International Power Securities Corp.* (CCA 3rd) 170 F.2d 399, 402; *In Re Kansas City Journal-Post Co.* (CCA 8th) 144 F.2d 791, 800, and *In Re Commonwealth Light and Power Co.,* (CCA 7th) 141 F.2d 734, 736.

In *Peters vs. Lines, supra,* the Ninth Circuit holds explicitly that the creditor by filing a proof of claim in bankruptcy consents to the summary jurisdiction of the bankruptcy court and waived any right to trial by jury to any of the issues involved, saying [927]:

"• • • We are not impressed by appellant's argument that they were denied their right to a jury trial. In view of the record on this point, such contention is far more illusory than real. In filing their proof of claim in the bankruptcy court appellants consented to the summary jurisdiction of the bankruptcy court and thereby waived any right to trial by jury on the issues involved in such claim. • • • "

Petitioner claims the loss of the same "right" to a jury trial, but of course had no such "right" and is nowhere guaranteed it, expressly or impliedly. The "right" is one to trial by jury "IN SUITS AT COMMON LAW". Bankruptcy does not operate within and is not derivative from the common law. It is principle diametrically opposed to the basic common law doctrines of judgment and execution and priority of time in lien and in right. It is historically non-derivative from common-law sources. It is in a manner of speaking *sui generis*, and the subject of explicit, ample, and broadly interpreted grant of power to the Congress, which has seen fit only in a few and isolated aspects of this many-faceted jurisdiction to authorize jury trial, a process inherently inapplicable to the equitable and accounting problems with which the jurisdiction is primarily designed to cope.

This Court has sometimes referred to the bankruptcy courts as courts of Equity, as in *Continental Illinois National Bank & Trust Co., supra, Local Loan Co. vs. Hunt*, 292 U.S. 234, 78 L.Ed 1230, 54 S.Ct., 695, 93 ALR 195; *Bardes vs. First Nat. Bank*, 178 U.S. 524, 44 L.Ed 1175, 20 S.Ct. 1000; and *Stucky vs. Masonic Saving Bank*, 108 U.S. 74, 27 L.Ed 64, 2 S.Ct. 219. In *Young vs. Higbee Co.*, 324 U.S. 204, 89 L.Ed 890, 65 S.Ct. 694, this Court con-

sidered the bankruptcy courts as courts of equity exercising all equitable powers unless prohibited therefrom by the Bankruptcy Act, while in *Pepper vs. Litton*, 308 U.S. 295, 84 L.Ed 281, 60 S.Ct. 218, this Court considered the bankruptcy courts to be courts of equity at least in the sense that these courts in the exercise of the jurisdiction conferred upon them by the Act apply principles and rules of equity jurisprudence, invoking equitable powers to the end that fraud will not prevail, that substance will not give way to form, and that technical considerations will not foreclose the doing of justice.

In *SEC vs. United States Realty & Improvement Co.*, 310 U.S. 434, 84 L.Ed 1293, 60 S.Ct. 1044, this Court pointed out that the bankruptcy courts might consider the public interest, exercising its power or staying its hand, in an equitable manner, when it reasonably appears that public rights will not suffer thereby.

Many other decisions, both of this Court and in the circuits, emphasize the rights, powers, and duties of the bankruptcy court, in its equitable jurisdiction, to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in the administration of a bankrupt estate, and most of the decisions emphasize the complexity of the problems dealt with and the need, as stated in *Hillman*, to deal with them whole, non-circuitously, and ultimately and finally, not piecemeal and protractedly.

The Act itself explicitly gives to the bankruptcy courts jurisdiction at law and in equity such as to permit them to exercise the original jurisdiction in proceedings under the Act, and the Act was pioneering in allowing in a single action administration of all available types of relief.

Amalgamating the decisions, it is quite clear that bankruptcy is not in the category of "suits at common law", though certainly it, as a court of equity, may not ignore the common law or common law rights. In procedural essence bankruptcy is differently polarized than the common law, generally proceeding in accordance with equitable principles, and really constituting a special, constitutional, and statutory branch of law, jurisdiction, and jurisprudence, which is not even remotely describable in the term "suits at common law" as used in the Seventh Amendment, and is something existing in parallel with and separate and distinct from the common law.

Historically, the jury has no role in bankruptcy claim determinations, and could not have been understood to have such a role, as of mandatory right, when the Bill of Rights and the included Seventh Amendment were adopted, and there is no right to "preserve".

Basically, the doctrines of claim and set-off, allowance of and judgment upon related counterclaim is an equitable doctrine of justice and convenience deriving from the maximal notion of complete adjudication of any controversy once submitted to a jurisdiction having power of cognizance.

Fundamentally, equal distribution of assets among creditors, not considering point of time or of execution, but proceeding upon a kind of principle of marshalling is clearly of equitable origin, and claim to participation therein, subject to duty of account on counterclaims, is a submission to equity jurisdiction, in which the right of jury never inhered, and operable upon bases in which jury utility does not exist.

Neither historically, nor in point of reason, nor in point of practicality of approach to the bankruptcy jurisdiction as defined by this Court does the jury have a role in proceedings of the kind at bar. Neither in words nor in principle does or should the Seventh Amendment apply.

CONCLUSION:

In conclusion, then, it is most respectfully submitted that the determination below is correct, and should be sustained.

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NO. 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

LOUIS KATCHEN,
Petitioner,

vs.

HYMAN D. LANDY, Trustee in Bankruptcy,
Respondent.

In the Matter of
KATCHEN'S BONUS CORNER, INC., Bankrupt

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. AN ACTION ARISING FROM A BANKRUPTCY PROCEEDING AND BASED ON A PREFERENTIAL TRANSFER TO RECOVER A MONEY JUDGMENT IS A SUIT AT COMMON LAW COVERED BY THE SEVENTH AMENDMENT.

Respondent states there is no merit in petitioner's claim of denial of a constitutional right to jury trial. This

is so, it is said, because under the English law there was no such right and because this is not a suit at common law covered by the Seventh Amendment.

Respondent could not be more in error. This Court has held specifically to the contrary. It was held that an action arising from a bankruptcy proceeding and based on a preferential transfer brought to recover a money judgment is a suit at common law within the meaning of the Seventh Amendment. *Schoenthal v. Irving Trust Co.*, 287 U.S. 92.

In that case the trustee filed a suit in equity in federal court alleging that payments received by the Schoenthals operated as a preference under Section 60 b. The trustee alleged that it had no adequate remedy at law and sought a decree directing defendants to pay over the sums received. Defendants applied for an order transferring the case to the law side of the court and for a jury trial. The lower courts denied the jury trial. This Court reversed [94]:

> "Section 267 of the Judicial Code provides: 'Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.' 28 U.S.C. §384. That rule has always been followed in courts of equity. The enactment gives it emphasis and indicates legislative purpose that it shall not be relaxed. [om. cit.] *It serves to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed.* Cf., In re Yerger, 8 Wall 85, 101-103. *In England, long prior to the enactment of our first Judiciary Act, common-law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts. Suits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it.* [Emphasis Supplied] Taylor v. Voss, 271 U.S. 176, 182. They may be brought in the state courts as well as in the bankruptcy courts. Collett v. Adams, 249 U.S. 545, 549. The question whether

> remedy must be by action at law or may be pursued in equity notwithstanding objection by defendant depends upon the facts stated in the bill. And, in the absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained. [om. cit.] The facts here alleged give no support to plaintiff's assertion that is has no adequate remedy at law. The preferences sued for were money payments of ascertained and definite amounts. The bill discloses no facts that call for an accounting or other equitable relief. ***"

The holding is directly in point. An action by a trustee to recover a money judgment because of an alleged preferential transfer [which is what is here involved] has been held by this Court to be a suit at common law, as to which there is a constitutional right to a jury trial.

Respondent at times asserts that the claim constitutes a suit in equity, but at other times he asserts that it is a proceeding in bankruptcy. The *Schoenthal* case holds it is *neither;* and the summary hearing below cannot be justified on either basis. This Court has explained the distinction between proceedings in bankruptcy and ordinary actions arising out of bankruptcy. Matters concerning the distribution of the bankrupt's assets are proceedings in bankruptcy. Actions to recover judgments against adverse parties are cases arising out of the bankruptcy, and plenary trials are necessary if the adverse party requests. See *Taylor v. Voss*, 271 U.S. 176. *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, should be dispositive of respondent's argument, and, we believe, makes manifest that petitioner was denied his constitutional right to trial by jury.

II. THE DECISIONS OF THIS COURT, NOT THE COURTS OF APPEALS, ARE CONTROLLING.

The major portion of the answer of respondent is devoted to briefs of cases decided by various Courts of Appeal. We agree that decisions from some circuits support, in part, the decision below; although we still say that the

Tenth is the only Circuit extending summary jurisdiction to a non-compulsory counterclaim merely because the counterclaim alleges a preference. (In spite of concessions made on our behalf by respondent, it is clear that the alleged preferential transfer to the North Denver Bank did not arise out of any transaction under which petitioner filed a claim.)

The most interesting thing about respondent's brief is not what it includes, but what it fails to include. There is a total absence of mention of the decisions of this Court relied upon by us in our opening brief. These cases appear to us to compel a holding against summary jurisdiction. We suggest that respondent was unable to state why the decisions of this Court are not controlling. And, certainly, the Circuits cannot overrule this Court.

Alexander v. Hillman, 296 U.S. 22, is argued at length by respondent. Perhaps it is respondent's position that the case overrules the previous decisions of this Court on summary jurisdiction in bankruptcy. For many reasons *Alexander v. Hillman* cannot be so construed. First, it is not a bankruptcy case. Secondly, no mention is made of the bankruptcy law, and the Court gave no indication of overruling its decisions on bankruptcy. Thirdly, the court involved was a court of general jurisdiction whereas the referee in bankruptcy has only that summary jurisdiction specifically conferred by statute. Fourthly, there was no jury issue in *Alexander v. Hillman*, because the counterclaim was cognizable in equity, whereas here, petitioner has a constitutional right to a jury.

Alexander v. Hillman does not justify the result below. The counterclaim there was equitable and the right to a jury thus was not involved. Nor can that decision be extended to permit denial of a jury. In two recent cases this court has held that the right to a jury cannot be denied on an issue, where otherwise it would exist, on the ground that the issue is joined with another on which there is no

jury right. *Beacon Theatres v. Westover*, 359 U.S. 500; *Dairy Queen v. Wood*, 369 U.S. 469.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 28.—October Term, 1965.

Louis Katchen, Petitioner, v. Hyman D. Landy, Trustee in Bankruptcy, etc.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[January 17, 1966.]

Mr. Justice White delivered the opinion of the Court.

The disputed issue here is whether the bankruptcy court has summary jurisdiction to order the surrender of voidable preferences asserted and proved by the trustee in response to a claim filed by the creditor who received the preferences. The Court of Appeals held that the bankruptcy court had such summary jurisdiction. 336 F. 2d 535. We affirm.

The corporate bankrupt began business on April 21, 1960, and borrowed $50,000 from two local banks. Petitioner, then an officer of the company, was an accommodation maker on the two corporate notes delivered to the banks. After the corporate bankrupt in this case suffered a disastrous fire, its funds and collections were placed in a "trust account" under the sole control of petitioner. From this account petitioner made two payments on one of the company notes on which he was an accommodation maker and one payment on the other. Bankruptcy followed within four months of these payments. Petitioner filed two claims in the proceeding, one for rent due him from the bankrupt and one for a payment on one of the notes made from his personal funds. The trustee responded with a petition asserting that the payments from the trust fund to the banks were voidable preferences and demanding judgment for the

amount of the preferences along with the amount of an unpaid stock subscription owed to the corporation by petitioner. Petitioner's objection to the summary jurisdiction of the referee was overruled, and judgment was rendered for the trustee on both the preferences and the stock subscription. Petitioner's claims were to be allowed only when and if the judgment was satisfied. The District Court sustained the referee. A divided Court of Appeals, sitting *en banc*, after reconsidering *Interstate National Bank of Kansas City* v. *Luther*, 221 F. 2d 382 (C. A. 10th Cir. 1955), cert. dismissed under Rule 60, 350 U. S. 944, adhered to its pronouncements in that case, affirmed the judgment for the amount of the voidable preferences but reversed the judgment for the amount of the stock subscription. The trustee did not seek review here of the adverse decision on the stock subscription. We granted certiorari on the creditor's petition because of the diversity of views among the Courts of Appeals on the issue involved [1] and the impor-

[1] *B. F. Avery & Sons Co.* v. *Davis*, 192 F. 2d 255 (C. A. 5th Cir. 1951), cert. denied, 342 U. S. 945, held the referee did not have summary jurisdiction to entertain the trustee's demand for surrender of the preference. In *Avery*, the preference arose out of a different transaction than the creditor's claim, and a subsequent decision of the Fifth Circuit notes that although that fact was not the articulated basis of the *Avery* decision, it may not preclude summary jurisdiction to order return of a preference received in the same transaction. *Gill* v. *Phillips*, 337 F. 2d 258 (1964), opinion on denial of rehearing, 340 F. 2d 318 (C. A. 5th Cir. 1965). The Fifth Circuit rule is thus uncertain, but *Avery* at least prevents summary recovery of unrelated preferences. Several Courts of Appeals have upheld the summary jurisdiction of the referee over counterclaims arising out of the same transaction as the creditor's claim but have stated that such jurisdiction does not extend to permissive counterclaims arising out of distinct transactions. See *In re Solar Mfg. Corp.*, 200 F. 2d 327 (C. A. 3d Cir. 1952), cert. denied *sub nom. Marine Midland Trust Co.* v. *McGirl*, 345 U. S. 940; *In re Majestic Radio & Television Corp.*, 227 F. 2d 152 (C. A. 7th Cir. 1955), cert. denied *sub nom. Dwyer* v. *Franklin*, 350 U. S. 995; *Peters* v. *Lines*,

tance of the question in the administration of the bankruptcy laws. 380 U. S. 971.

The crux of the dispute here concerns the mode of procedure for trying out the preference issue. The bankruptcy courts are expressly invested by statute with original jurisdiction to conduct proceedings under the Bankruptcy Act.[2] These courts are essentially courts of equity, *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240; *Pepper* v. *Litton*, 308 U. S. 295, 304, and they characteristically proceed in summary fashion to deal with the assets of the bankrupt they are administering. The bankruptcy courts "have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession." *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 481; *Cline* v. *Kaplan*, 323 U. S. 97, 98–99; *May* v. *Henderson*, 268 U. S. 111, 115–116; *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 432–434. They also deal in a summary way with "matters of an administrative character, including questions between the bankrupt and his creditors, which are presented in the ordinary course of the administration of the bankrupt's estate." *Taylor* v. *Voss*, 271 U. S. 176, 181; *U. S. Fidelity Co.* v. *Bray*, 225 U. S. 205, 218. This is elementary bankruptcy law which petitioner does not dispute.

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275 F. 2d 919 (C. A. 9th Cir. 1960). The decision presently under review upholds summary jurisdiction to order return of a preference whether or not the preference relates to the same transaction as the claim but declines to extend such jurisdiction to unrelated counterclaims not involving a preference, set-off, voidable lien, or a fraudulent transfer. 336 F. 2d, at 537.

[2] Bankruptcy Act § 2 (a), 11 U. S. C. § 11 (a) (1964 ed.), provides:

"(a) The courts of the United States hereinbefore defined as courts of bankruptcy are created courts of bankruptcy and are invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title . . . ."

But petitioner points out that if a creditor who has received a preference does not file a claim in the bankruptcy proceeding and holds the property it received under a substantial adverse claim, so that the property may not be deemed within the actual or constructive possession of the bankruptcy court, the trustee may recover the preference only by a plenary action under § 60 of the Act, 11 U. S. C. § 96 (1964 ed.), see *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426; and in a plenary action in the federal courts the creditor could demand a jury trial, *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, 94–95; *Adams* v. *Champion*, 294 U. S. 231, 234; compare *Buffum* v. *Peter Barceloux Co.*, 289 U. S. 227, 235–236. Petitioner contends the situation is the same when the creditor files a claim and the trustee not only objects to allowance of the claim but also demands surrender of the preference. This is so, petitioner argues, because the Bankruptcy Act does not confer summary jurisdiction on the bankruptcy court to order preferences surrendered and because, if it does, petitioner's rights under the Seventh Amendment of the Constitution are violated. We agree with neither contention.

With respect to the statutory question, it must be conceded that the Bankruptcy Act does not in express terms confer summary jurisdiction to order claimants to surrender preferences. But Congress has often left the exact scope of summary proceedings in bankruptcy undefined, and this Court has elsewhere recognized that in the absence of congressional definition this is a matter to be determined by decisions of this Court after due consideration of the structure and purpose of the Bankruptcy Act as a whole, as well as the particular provisions of the Act brought in question. *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 431 and n. 7.

When Congress enacted general revisions of the bankruptcy laws in 1898 and 1938, it gave "special attention to the subject of making [the bankruptcy laws] inex-

pensive in [their] administration." H. R. Rep. No. 1228, 54th Cong., 1st Sess., p. 2; H. R. Rep. No. 1409, 75th Cong., 1st Sess., p. 2; S. Rep. No. 1916, p. 2. Moreover, this Court has long recognized that a chief purpose of the bankruptcy laws is "to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period," *Ex parte Christy*, 3 How. 292, 312, and that provision for summary disposition, "without regard to usual modes of trial attended by some necessary delay," is one of the means chosen by Congress to effectuate that purpose, *Bailey* v. *Glover*, 21 Wall. 342, 346. See generally, *Wiswall* v. *Campbell*, 93 U. S. 347, 350–351; *U. S. Fidelity Co.* v. *Bray*, 225 U. S. 205, 218.

It is equally clear that the expressly granted power to "allow," "disallow" and "reconsider" claims, Bankruptcy Act § 2 (a)(2), 11 U. S. C. § 11 (a)(2) (1964 ed.),[3] which is of "basic importance in the administration of a bankruptcy estate," *Gardner* v. *New Jersey*, 329 U. S. 565, 573, is to be exercised in summary proceedings and not by the slower and more expensive processes of a plenary suit. *U. S. Fidelity Co.* v. *Bray*, 225 U. S. 205, 218; *Wiswall* v. *Campbell*, 93 U. S. 347, 350–351. This power to allow or to disallow claims includes "full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or a claim against the estate is based. This is essential to the performance of the duties imposed upon it." *Lesser* v. *Gray*, 236 U. S. 70, 74. The trustee is enjoined to examine all claims and to present his objections, Bankruptcy Act § 47 (a)(8), 11 U. S. C. § 75 (a)(8) (1964 ed.),[4]

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[3] 11 U. S. C. § 11 (a)(2) confers power to:

"(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates."

[4] 11 U. S. C. § 75 (a)(8) provides that trustees shall:

"(8) examine all proofs of claim and object to the allowance of such claims as may be improper."

and "[w]hen objections are made, [the court] is duty bound to pass on them," *Gardner* v. *New Jersey*, 329 U. S. 565, 573. "The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*," *Gardner* v. *New Jersey*, *supra*, at 574, and thus falls within the principle quoted above that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession. Further, the Act itself directs that "[o]bjections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit," Bankruptcy Act § 57 (f), 11 U. S. C. § 93 (f)(1964 ed.), and the committee reports accompanying that provision indicate it means that "[o]bjections shall be heard and determined in a summary way," H. R. Rep. No. 1674, 52d Cong., 1st Sess., p. 20.

Section 57 of the Act contains another important congressional directive around which much of this case turns. Subsection (g) forbids the allowance of a claim when the creditor has "received or acquired preferences . . . void or voidable under this title," absent a surrender of the preference. Bankruptcy Act § 57 (g), 11 U. S. C. § 93 (g) (1964 ed.).[5] Unavoidably and by the very terms of the

[5] 11 U. S. C. § 93 (g) provides:

"(g) The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this title, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances."

The language of this section, it will be observed, is concerned with *creditors* rather than *claims* and thus contemplates that allowance of a claim may be conditioned on surrender of preferences received with respect to transactions unrelated to the claims. The exact reach of § 57 (g) is not entirely settled, see 3 Collier on Bankruptcy, § 57.19 [3.2] (Moore ed. 1964), and that question is not involved here.

Act, when a bankruptcy trustee presents a § 57 (g) objection to a claim, the claim can neither be allowed nor disallowed until the preference matter is adjudicated. The objection under § 57 (g) is, like other objections, part and parcel of the allowance process and is subject to summary adjudication by the bankruptcy court. This is the plain import of § 57 and finds support in the same policy of expedition that underlies the necessity for summary action in many other proceedings under the Act.

There is no contrary indication in any other provision of the Act. The provisions of the Acts of 1800 and 1841 which gave the creditor the right to have its claim tried by a jury were not repeated in the Acts of 1857 and 1898.[6] Section 19 of the current law, Bankruptcy Act § 19, 11 U. S. C. § 42 (1964 ed.), requires a jury in only limited situations and is not helpful to petitioner in this case. It is true that § 60, dealing with preferences and their voidability, confers concurrent jurisdiction on state courts and the federal bankruptcy courts to entertain *plenary* suits for the recovery of preferences. But by its own terms this provision applies only "where plenary suits are necessary" and hence itself contemplates non-plenary recovery proceedings.[7]

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[6] The history of the early jury trial provisions is traced in *In re United Button Co.*, 140 F. 495 (D. C. D. Del.), *aff'd sub nom. Brown & Adams* v. *United Button Co.*, 149 F. 48 (C. A. 3d Cir. 1906).

[7] Bankruptcy Act § 60 (b), 11 U. S. C. § 96 (b) (1964 ed.), provides:

"(b) Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent

If anything, the other provisions of the Act support the view that § 57 (g) objections are to be summarily determined. Section 57 (k) provides for reconsideration of claims that have previously been allowed, and § 57 (*l*) provides that when a claim has been reconsidered and rejected the trustees may recover any dividend previously paid on it, proceedings for such recovery to be within the summary jurisdiction of the bankruptcy court.[8] Even under the predecessor to the present section, which did not expressly provide that the dividend could be summarily recovered, Bankruptcy Act of 1898, § 57 (*l*), 30 Stat. 561, this Court held that the referee had jurisdiction to determine whether a preference has been received and to order return of the dividend. *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, 455–456.[9] So

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value . . . . For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

[8] Bankruptcy Act §§ 57 (k) and (*l*), 11 U. S. C. §§ 93 (k) and (*l*) (1964 ed.), provide:

"(k) Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.

"(l) Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part, and the trustee may also recover any excess dividend paid to any creditor. The court shall have summary jurisdiction of a proceeding by the trustee to recover any such dividends."

[9] Under the Act as it then stood, the preference involved in *Pirie* was not voidable or recoverable but nevertheless was ample ground for disallowance of the claim. But the creditor argued that compelling repayment of the dividend would constitute determination of a "suit by the trustee" without the consent of the defendant

too, proceedings under § 60 (d), 11 U. S. C. § 96 (d) (1964 ed.),[10] for examination of the reasonableness of amounts paid in contemplation of bankruptcy to an attorney for services to be rendered for the bankrupt are within the summary jurisdiction of the referee although the Act does not expressly so provide. *In re Wood and*

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contrary to the provisions of then § 23 (b) (presently codified, without alterations material to the present discussion, in 11 U. S. C. § 46 (b) (1964 ed.)) that:

"b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted unless by consent of the proposed defendant." 30 Stat. 552.

That argument was rejected by the Court on the ground the proceedings under review were not a "suit" within the meaning of the quoted provision. 182 U. S., at 455–456. We apply that reasoning in our opinion today and hold that determination of objections to claims, whether or not affirmative relief is decreed, does not constitute adjudication of a suit by the trustee, and thus it is not necessary to ascertain whether the creditor has "consented" to such determination within the meaning of § 23 (b). Rather, our decision is governed by the "traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. *Wiswall* v. *Campbell*, 93 U. S. 347, 351." *Gardner* v. *New Jersey*, 329 U. S. 565, 573. As this is the basis of our decision, we obviously intimate no opinion concerning whether the referee has summary jurisdiction to adjudicate a demand by the trustee for affirmative relief, all of the substantial factual and legal bases for which have not been disposed of in passing on objections to the claim.

[10] 11 U. S. C. § 96 (d) provides:

"(d) If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate. . . ."

Henderson, 210 U. S. 246; *Conrad, Rubin & Lesser* v. *Pender*, 289 U. S. 472.

So far we have been discussing principles applicable to a case where the trustee presents a § 57 (g) objection to a claim but does not seek the affirmative relief of surrender of the preference. But once it is established that the issue of preference may be summarily adjudicated absent an affirmative demand for surrender of the preference, it can hardly be doubted that there is also summary jurisdiction to order the return of the preference. This is so because in passing on a § 57 (g) objection the bankruptcy court must necessarily determine the amount of preference, if any, so as to ascertain whether the claimant, should he return the preference, has satisfied the condition imposed by § 57 (g) on allowance of the claim. *Schwartz* v. *Levine & Malin, Inc.*, 111 F. 2d 81 (C. A. 2d Cir. 1940). Thus, once the bankruptcy court has dealt with the preference issue nothing remains for adjudication in a plenary suit. The normal rules of *res judicata* and collateral estoppel apply to the decisions of bankruptcy courts. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 376–377; *Stoll* v. *Gottlieb*, 305 U. S. 165. More specifically, a creditor who offers a proof of claim and demands its allowance is bound by what is judicially determined, *Wiswall* v. *Campbell*, 93 U. S. 347, 351; and if his claim is rejected, its validity may not be relitigated in another proceeding on the claim. *Sampsell* v. *Imperial Paper Corp.*, 313 U. S. 215, 218–219; *Lesser* v. *Gray*, 236 U. S. 70, 75. The circuit courts have uniformly applied these principles to hold that the bankruptcy court's resolution of the § 57 (g) objection is *res judicata* in a subsequent action by the trustee under § 60 to recover the preference. *Schwartz* v. *Levine & Malin, Inc.*, 111 F. 2d 81 (C. A. 2d Cir. 1940); *Giffin* v. *Voughn*, 175 F. 2d 186 (C. A. 2d Cir. 1949); *Ullman, Stern & Krausse* v. *Coppard*, 246 F. 124 (C. A.

5th Cir. 1917); *Breit* v. *Moore*, 220 F. 97 (C. A. 9th Cir. 1915); *Johnson* v. *Wilson*, 118 F. 2d 557 (C. A. 9th Cir. 1941); see *In re J. R. Palmenberg Sons*, 76 F. 2d 935 (C. A. 2d Cir. 1935), aff'd *sub nom. Bronx Brass Foundry, Inc.* v. *Irving Trust Co.*, 297 U. S. 230. To require the trustee to commence a plenary action in such circumstances would be a meaningless gesture, and it is well within the equitable powers of the bankruptcy court to order return of the preference during the summary proceedings on allowance and disallowance of claims. Compare *In re Wood and Henderson*, 210 U. S. 246, 256 (determination of reasonableness of attorney's fee would be *res judicata* in suit to recover the excess), with *Conrad, Rubin & Lesser* v. *Pender*, 289 U. S. 472 (upholding turnover order). What we said in *Alexander* v. *Hillman*, 296 U. S. 222, in connection with the jurisdiction of a receivership court to entertain a counterclaim against a claimant in the receivership proceeding, is equally applicable here:

> "By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance . . . .
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> "Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivors reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief." 296 U. S., at 241–242.

Our examination of the structure and purpose of the Bankruptcy Act and the provisions dealing with allowance of claims therefore leads us to conclude, and we so hold, that the Act does confer summary jurisdiction to compel a claimant to surrender preferences that under § 57 (g) would require disallowance of the claim.[11] A number of Circuit Courts of Appeals, including the court below, have reached similar results.[12]

Petitioner contends, however, that this reading of the statute violates his Seventh Amendment right to a jury trial. But although petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity. The Bankruptcy Act, passed pursuant to the power given to Congress by Art. I, § 8 of the Constitution to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*, *Gardner* v. *New Jersey*, 329 U. S. 565, 573–574, a share which can neither be determined nor allowed until the creditor disgorges the alleged voidable preference he has already received. See *Alexander* v. *Hillman*, 296 U. S. 222, 242. As bankruptcy courts have summary jurisdiction to adjudicate contro-

[11] See note 5, *supra*.

[12] See the decisions cited in note 1, *supra*, upholding summary jurisdiction to grant affirmative relief on related counterclaims that would also be defenses to the claim, particularly *In re Solar Mfg. Corp.*, 200 F. 2d 327, 331 (C. A. 3d Cir. 1952), cert. denied *sub nom. Marine Midland Trust Co.* v. *McGirl*, 345 U. S. 940; *In re Majestic Radio & Television Corp.*, 227 F. 2d 152, 156 (C. A. 7th Cir. 1955), cert. denied *sub nom. Dwyer* v. *Franklin*, 350 U. S. 995. See also *Florance* v. *Kresge*, 93 F. 2d 784 (C. A. 4th Cir. 1938); *Floro Realty & Inv. Co.* v. *Steem Electric Corp.*, 128 F. 2d 338 (C. A. 8th Cir. 1942).

versies relating to property over which they have actual or constructive possession, *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 481; *Cline* v. *Kaplan*, 323 U. S. 97, 98–99; *May* v. *Henderson*, 268 U. S. 111, 115–116, and as the proceedings of bankruptcy courts are inherently proceedings in equity, *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240; *Pepper* v. *Litton*, 308 U. S. 295, 304, there is no Seventh Amendment right to a jury trial for determination of objections to claims, including § 57 (g) objections. As this Court has previously said in answering the argument that disputed claims must be tried before a jury:

> "But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity.
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> . . . . .
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> "So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods."

Barton v. *Barbour*, 104 U. S. 126, 133–134. This has been the characteristic view of the courts. *Carter* v. *Lechty*, 72 F. 2d 320 (C. A. 8th Cir. 1934); *In re Michigan Brewing Co.*, 24 F. Supp. 430 (W. D. Mich. 1938), aff'd, 101 F. 1007 (C. A. 6th Cir. 1939); *In re Rude*, 101

F. 805 (D. C. D. Ky. 1900); *In re Christensen*, 101 F. 243 (D. C. N. D. Ia. 1900). See also *In re Wood and Henderson*, 210 U. S. 246, 258; *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, 455–456.

And of course it makes no difference, so far as petitioner's Seventh Amendment claim is concerned, whether the bankruptcy trustee urges only a § 57 (g) objection or also seeks affirmative relief. In practical effect, the denial of a jury trial would be no less were the bankruptcy court merely to determine the existence and amount of the preference, since that determination would be entitled to *res judicata* effect in any subsequent plenary action. And we have held that equity courts have power to decree complete relief and for that purpose may accord what would otherwise be legal remedies. See *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 291–292; *Porter* v. *Warner Co.*, 328 U. S. 395, 398–399; *Alexander* v. *Hillman*, 296 U. S. 222; *McGowan* v. *Parish*, 237 U. S. 285, 296.

Petitioner's final reliance is on the doctrine of *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, and *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, that "where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.'" 369 U. S., at 472–473.

The argument here is that the same issues—whether the creditor has received a preference and, if so, its amount—may be presented either as equitable issues in the bankruptcy court or as legal issues in a plenary suit and that the bankruptcy court should stay its own proceedings and direct the bankruptcy trustee to commence a plenary suit so as to preserve petitioner's right to a jury trial. Unquestionably the bankruptcy court would have

power to give such an instruction to the trustee, *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483–484; see Bankruptcy Act § 2 (a)(7), 11 U. S. C. § 11 (a)(7) (1964 ed.), and some lower courts have required such a procedure, *B. F. Avery & Sons Co.* v. *Davis*, 192 F. 2d 255 (C. A. 5th Cir. 1951), cert. denied, 342 U. S. 945; *Triangle Electric Co.* v. *Foutch*, 40 F. 2d 353 (C. A. 8th Cir. 1930); *Katchen* v. *Landy*, 336 F. 2d 535, 543 (C. A. 10th Cir. 1964) (Phillips, J., dissenting in part). Nevertheless we think this argument must be rejected.

At the outset, we note that the *Dairy Queen* doctrine, if applicable at all, is applicable whether or not the trustee seeks affirmative relief. For, as we have said, determination of the preference issues in the equitable proceeding would in any case render unnecessary a trial in the plenary action because of the *res judicata* effect to which that determination would be entitled. Thus petitioner's argument would require that in every case where a § 57 (g) objection is interposed and a jury trial is demanded the proceedings on allowance of claims must be suspended and a plenary suit initiated, with all the delay and expense that course would entail. Such a result is not consistent with the equitable purposes of the Bankruptcy Act nor with the rule of *Beacon Theatres* and *Dairy Queen*, which is itself an equitable doctrine, *Beacon Theatres* v. *Westover*, 359 U. S. 509–510. In neither *Beacon* nor *Dairy Queen* was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury. We think Congress intended the trustee's § 57 (g) objection to be summarily determined; and to say that because the trustee could bring an independent suit against the creditor to recover his voidable preference, he is not entitled to have his statutory objection to the claim tried in the bankruptcy court in the normal manner is to dismember a scheme which Congress has

prescribed. See *Alexander* v. *Hillman*, 296 U. S. 222, 243. Both *Beacon* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim. To implement congressional intent, we think it essential to hold that the bankruptcy court may summarily adjudicate the § 57 (g) objection; and, as we have held above, the power to adjudicate the objection carries with it the power to order surrender of the preference.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent for the reasons stated in the dissenting opinion of Judge Phillips in the Court of Appeals.